

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC. : Civil Action No.
vs. : 3:09CV620
LAWSON SOFTWARE, INC. : October 24, 2012

COMPLETE TRANSCRIPT OF THE MOTIONS HEARING
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE CLERK: Civil action number 3:09CV00620, ePlus Inc., versus Lawson Software, Incorporated. Mr. Scott L. Robertson, Ms. Jennifer A. Albert, Mr. Michael G. Strapp, and Mr. Paul W. Jacobs, II, represent the plaintiff.

Mr. Josh Krevitt, Mr. Daniel Thomasch, Mr. Dabney J. Carr, IV, Mr. Richard W. Mark represent the defendant. Are counsel ready to proceed?

MR. ROBERTSON: Plaintiff is, Your Honor.

MR. THOMASCH: Defendant is, Your Honor.

THE COURT: All right. It's your motion, I believe.

MR. THOMASCH: Your Honor, if I might, I have one preliminary matter before Mr. Robertson starts.

THE COURT: Come up here so she can hear you. Yes, sir.

MR. THOMASCH: The only preliminary matter, Your Honor, is I don't know, obviously, the content of Mr. Robertson's argument. To the extent that he intends to disclose the content of any of the documents on our privilege log, then we do want to make sure that we don't find ourselves in a situation where this proceeding constitutes a waiver.

We've filed the papers, as has the plaintiffs, under seal, and would I ask that the proceedings be closed to the public if the content of the documents is going to be

1 disclosed. If not, then we can, obviously, talk about the
2 legal issues and the procedures without regard to -- I'm not
3 desirous of having anyone leave the courtroom, but I am,
4 obviously, sensitive, under the circumstances, to assertions of
5 waiver.

6 THE COURT: All right.

7 MR. THOMASCH: Thank you, Your Honor.

8 THE COURT: What is your response on that, Mr.
9 Robertson?

10 MR. ROBERTSON: I have no problem with that, Your
11 Honor. I do just point out --

12 THE COURT: What is the solution?

13 MR. ROBERTSON: Well --

14 THE COURT: Are you going to use the content of the
15 documents I think is the fundamental question Mr. Thomasch is
16 raising.

17 MR. ROBERTSON: Yes, Your Honor, I think we are going
18 to be looking at some of the content of the documents, but I
19 think mostly we're going to be focusing on entries in the
20 privilege log.

21 In fact, there are one or two examples I might be
22 bringing to Your Honor's attention about issues that are the
23 withhold documents under the Court's February 21 order. I
24 don't think there's anybody in the courtroom right now with the
25 exception of Mr. Farber who, you will recall, is my client

1 representative who can be here under the rules and has been
2 here throughout the trial when documents that were proprietary
3 were revealed. So I don't see how this is open to the public.

4 THE COURT: Because it's always open to the public
5 unless it's sealed, and then there's a transcript, and if you
6 order the transcript, which I think you all have frequently
7 done -- I guess that's sort of an understatement -- then it's
8 available to the public, too. So I think that's what he's
9 concerned about.

10 MR. ROBERTSON: Well, Your Honor, then I don't have a
11 problem --

12 THE COURT: Why don't we take it this way: Why don't
13 we seal the proceedings for now, and then you all are charged
14 with the responsibility of, within ten days after the
15 transcript is available to you, identifying in a paper that
16 part or those parts of the transcript which you believe needs
17 to be sealed, and if you all are in agreement, we'll enter an
18 order to that effect, and the rest of it will be open to the
19 public.

20 MR. THOMASCH: Thank you, Your Honor.

21 THE COURT: So I'll leave that -- I'm going to put
22 that particular matter, Mr. Thomasch, on your plate as the
23 party who has got the greatest interest in identifying the
24 parts. So if you'll take care of that and be responsible for
25 doing that, I'd appreciate it.

1 MR. THOMASCH: We will, Your Honor.

2 MR. ROBERTSON: Thank you, Your Honor. May I
3 proceed?

4 THE COURT: Sure.

5 MR. ROBERTSON: Good morning. May it please the
6 Court --

7 THE COURT: Good morning.

8 MR. ROBERTSON: As you're well aware, we're here on
9 ePlus's motion to enforce the Court's February 21, 2012, order
10 requiring Lawson to produce documents that were otherwise
11 attorney/client privileged or subject to the work product
12 privilege which has been waived, or were improperly logged on a
13 fourth iteration of a privilege log that did not contain
14 authors or recipients or were distributed widely or documents
15 that were merely cc-ed to attorneys or documents even between
16 laypersons at Lawson that supposedly reflected attorney
17 privileged communications.

18 At this point, Your Honor, given that we are now
19 eight months from the Court's order and almost three months
20 from an extraordinary writ of mandamus that was denied by the
21 Federal Circuit, we believe that sanctions are now appropriate
22 for Lawson's failure to produce more than 4,000 documents that
23 were subject to the Court's order.

24 THE COURT: Isn't the predicate whether they have, in
25 fact, not complied with the order?

1 MR. ROBERTSON: There is, Your Honor, and I'm going
2 to get very specific about why they have not complied with that
3 order. And let's not forget, Your Honor, first principles
4 about why we're all here. We're here now some 16 months after
5 the Court entered an injunction and almost a year after the
6 Court found -- granted a show cause motion for why Lawson
7 should not be held in contempt of this Court's injunction.

8 Now, the defendant complains that we didn't properly
9 meet and confer with respect to the -- before we filed this
10 motion. Not only did we meet and confer on at least two
11 occasions, we had extensive correspondence between the parties,
12 and, indeed, we held a meet-and-confer in which, I would
13 suggest, the Court participated on September 14 and gave Lawson
14 express instructions and guidance as to how to comply with this
15 Court's order.

16 And notwithstanding those express instructions and
17 guidance from the Court more than a month ago, they have still
18 failed to comply with this Court's order. Now, not only did
19 the Court clarify how they should comply, the Court made clear
20 that this was a subject matter waiver. And what they have done
21 is they have taken a look at what the subject matter is, which
22 involved the redesign, or alleged redesign, of the infringing
23 systems, and they have taken a cramped and hyper technical view
24 as to what that means.

25 It's as restrictive as they can notwithstanding that

1 the Court, on September 14, told them that they couldn't get
2 cute with the words.

3 But in their opposition, which was two weeks after
4 the Court's instructions, they are now trying to limit the
5 waiver to what they call RQC development and nothing more than
6 that notwithstanding that their privilege log reviews that
7 there are multiple documents that involve that development that
8 they failed to produce. In fact --

9 THE COURT: Let's see what -- what did the order say
10 was the subject of the subject matter waiver?

11 MR. ROBERTSON: Certainly, Your Honor. If I might --

12 THE COURT: Isn't that the matter -- I don't need to
13 be redefining anything that's already been settled. I want to
14 make sure we're all working from the same definition.

15 MR. ROBERTSON: Understood, Your Honor.

16 MR. THOMASCH: I can read it to Your Honor if Your
17 Honor wants.

18 MR. ROBERTSON: I'd like to be able to present my own
19 argument if I could, Your Honor. I have a PowerPoint, and I
20 have the order right here, the operative wording. It's at page
21 two, Your Honor, and it's on your screen, but I know you prefer
22 to see it in a hard copy as well.

23 THE COURT: Well, when you get to be 71, you might
24 prefer that, too.

25 MR. ROBERTSON: But it's at page two, and it says,

1 "The attorney-client privilege has been waived as the subject
2 matter of Lawson's development of the RQC module."

3 Then number three goes on to identify why the
4 privilege log entries were defective, and I won't go through
5 those right now, but number four is also pertinent. It says
6 Lawson has not shown work product protection attaches to the
7 lawyer work in developing RQC.

8 I also have another document I'd like to hand up to
9 Your Honor which we have indicated that there are more than
10 4,000 documents still at issue, and what I did is I asked one
11 of my colleagues to go through those documents and come up with
12 200 exemplary documents that we think are relevant and subject
13 to the Court's order. And what I did in this document, Your
14 Honor, is I whittled that down to 30 documents that I would say
15 are exemplary and demonstrate Lawson's willful violation of
16 this Court's order and its subsequent guidance.

17 If I might just --

18 THE COURT: We're here for two reasons, though. One
19 is a motion to compel, and in order to do that, the appropriate
20 order that issues from a court if a motion of that sort is
21 granted is to identify what it is that is to be compelled. Are
22 you now saying to me that the reach of your motion is confined
23 to these 30 documents that you are talking about?

24 MR. ROBERTSON: No, sir. I'm providing them as
25 exemplary, because I did not want the Court to have to go

1 through 4,000 documents. I know the Court has looked at *in*
2 *camera* in the past, I know just this past summer 100 documents.
3 What I wanted to do is if the Court deems it necessary, produce
4 an exemplary 200 documents. So you or your law clerk probably,
5 unfortunately, will have to go through these --

6 THE COURT: Actually, when I have privilege issues, I
7 generally do that myself.

8 MR. ROBERTSON: Understood.

9 THE COURT: In addition to having the law clerk
10 double-check what I'm doing, but privilege waivers are, in the
11 Court's judgment, very serious matters, and they're not
12 lightly, ever found because they can have such serious
13 ramifications for the lawyers and for the clients, and so I
14 study that matter very carefully. So these are just examples.

15 MR. ROBERTSON: Yes, sir. And I understand and
16 appreciate that, and I want to refresh the Court that we went
17 through this exercise before, and the Court did find a waiver
18 which was subject --

19 THE COURT: On page 18 of the opinion it says,
20 "Lawson clearly waived the privilege with respect to the
21 subject matter of the development of the RQC module," which is
22 reflected in the concluding paragraphs of the opinion, on page
23 23 of the opinion and subparagraph two, and in subparagraph
24 four where the Court deals with the work product protection
25 which is dealt with on pages 21 and 22 holding that Lawson has

1 not established that the work of the lawyers was done in
2 anticipation of litigation and that they waived -- they haven't
3 shown work product protection for the documents dealing with
4 the development of RQC. So those are findings there. We don't
5 need to revisit those.

6 So the question is, are there documents that are
7 being withheld that fit description. If they are, then you may
8 be entitled to relief. If they're not, you're not.

9 MR. ROBERTSON: Understood, Your Honor, and I
10 understand that's my burden, and now I'd like to address that.
11 The document that I handed you that's entitled 30 examples of
12 Lawson's willful violation of this Court's order at page two,
13 there's a heading that says, "Lawson continues to refuse to
14 produce documents related to development of requisition
15 center," RQC, and I'm not going to belabor the point, Your
16 Honor, because there's several examples, and as I say, they are
17 only examples. We believe there are more than 800.

18 Let's just take a look at a few of the examples, and
19 I'm just going to recite the document number and the
20 description. So the first example is document -- this is a
21 privilege number from Lawson's privilege log, 682.
22 Description: Document disseminating legal advice from internal
23 counsel re: RQC replacement for customers prepared in
24 anticipation of litigation. That, of course, is work product.
25 Your Honor actually found they didn't establish a work product

1 privilege clearly directed to the RQC development.

2 Document 804 --

3 THE COURT: This is the listing that was on the
4 privilege list that I reviewed?

5 MR. ROBERTSON: Yes, sir. This is lifted right out
6 of the privilege log. I didn't create this. We inserted this
7 into the document.

8 Document 804, description: Email reflecting legal
9 advice of Jordan Ekelin, who is an attorney, re: RQC/RSS,
10 software migration and customer service in anticipation of
11 litigation.

12 Document 1376, email requesting legal advice re: RQC
13 performance issue prepared in anticipation of litigation.

14 Document 2229, email conveying legal advice re:
15 launch of RQC prepared in anticipation of litigation.

16 Let me drop down to document 3853 discussing RQC
17 source code. You'll recognize Mr. Schultz is one of the
18 copyees on that document. Document 5279, questions and
19 responses from Bruce McPheeters -- that was Lawson's general
20 counsel at the time -- re: RQC upgrade plan.

21 Document 6437 -- I'm now on page four, Your Honor --
22 email conveying legal opinion re: RQC differences.

23 Document 6798, discussing RQC upgrade.

24 Document 8442, conveying question from in-house legal
25 counsel regarding changes and compliance with injunction.

1 There are more than 800 documents, Your Honor, of this nature
2 that Lawson continues to withhold notwithstanding the Court's
3 explicit order and guidance that you provided. If you can go
4 to the transcript on September 14 with the Court's
5 instructions.

6 That would be -- this is in the PowerPoint, Your
7 Honor, that I've given you, slide eight. This was Your Honor's
8 instructions.

9 THE COURT: What page?

10 MR. ROBERTSON: Page eight, Your Honor. Apparently
11 there was some confusion with regard to the scope of Your
12 Honor's order that we had discussed in several
13 meet-and-confers, and Lawson had asked us to tell them what our
14 understanding of the order was, and our understanding of the
15 order was you need to comply with it.

16 And then they said -- I asked them what was their
17 understanding, and they said they hadn't developed one yet.
18 And we said, well, when do you think you'll develop it, and
19 they said, we couldn't give you any time certain, which
20 prompted us to file this motion. This was the day after we
21 filed the motion.

22 The Court indicated, "If your document has a caption
23 on it that it is re: RSS or RQC or redesign or whatever it is,
24 you have to produce it." And the Court went on to say after I
25 argued that -- these are their own self descriptions, Your

1 Honor. These are what they're saying it involves.

2 They say, "but if your own client captioned it as one
3 way or another, and you captioned that particular description
4 and put it and used it on your log, you can't withhold the
5 document on the grounds that it didn't comply with what its
6 heading was. That means -- that won't fly." And here we are
7 now, more than a month after that, and we still have at least
8 800, and we think many more, that fall directly within the
9 Court's February 21 order.

10 Now, to be certain, there are a number, more than
11 2,000 or so, that have cryptic descriptions that we don't know,
12 because we don't know what we don't know, what the document
13 said. But they are from the usual suspects that were involved
14 in the redesign, and they are within the parameters
15 post-injunction, pre -- post-injunction hearing, excuse me, pre
16 your injunction order which was May 24 of 2011, and they
17 clearly involve -- I mean, because during that period, that was
18 the period of activity in which they were attempting to
19 redesign around something which we believe they have not
20 redesigned around, but we don't know -- it doesn't expressly
21 say RQC, Your Honor.

22 So on the basis of that, they're withholding those
23 documents, and what they say is, well, we reviewed them, and
24 trust us, that, you know, they really don't apply.

25 THE COURT: Why do I not take them -- they're

1 officers of the court.

2 MR. ROBERTSON: Excuse me, sir?

3 THE COURT: They're officers of the court that are
4 saying that. What reason do I have to believe that they
5 have -- if, in the case of a document that doesn't have any
6 indication on its log that it's redesign or development of the
7 RQC/RSS, then -- and they say, well, we've reviewed the
8 underlying document and it doesn't pertain to that, why do I
9 have a ground upon which to say, you're not basically shooting
10 straight and you're not telling me the truth? That's a pretty
11 serious thing.

12 MR. ROBERTSON: I understand, Your Honor. It's a
13 very serious thing, and here's why: I just gave you a dozen
14 examples of things that expressly reference RQC development
15 that they're withholding, and I just represented to the Court
16 that there are more than 800 of those documents that they're
17 withholding.

18 THE COURT: Right, in a different category and being
19 withheld, I believe, for a different reason, aren't they?

20 MR. ROBERTSON: Well, Your Honor, quite frankly,
21 that's why *in camera* review is appropriate here, because while
22 we should trust, we should verify, and, you know, there's an
23 old expression, Scottish expression since I'm Scottish, fool me
24 once, shame on them, fool me twice, shame on me. And I feel
25 we've been fooled here, both on the contempt that's underlying

1 this whole thing and on these privilege issues, because we are
2 seeing a number of documents, Your Honor, that are being
3 produced that demonstrate to us that there is a fraud on the
4 Court going on here, and if I might just go in your
5 PowerPoint --

6 THE COURT: You mean that there was a fraud going on
7 in the redesign and the statements made with respect to it?

8 MR. ROBERTSON: Yes, sir, both --

9 THE COURT: Not that the current lawyers are
10 committing a fraud on the Court now. You're not saying that,
11 are you?

12 MR. ROBERTSON: I'm not saying that yet, Your Honor,
13 and, Your Honor, I raised that before, but I understand that's
14 a very serious charge, but, you know -- and you must consider
15 the perspective, but I think there's a serious conspiracy going
16 on here with respect to this, and documents that are being
17 produced --

18 THE COURT: Conspiracy about what?

19 MR. ROBERTSON: Concerning both withholding these
20 documents that are relevant and pertinent and subject to the
21 Court's order --

22 THE COURT: A conspiracy between whom?

23 MR. ROBERTSON: The lawyers and Lawson. This
24 whole --

25 THE COURT: Current counsel?

1 MR. ROBERTSON: Well, the current counsel must have
2 been involved at some point with the fact of defending this
3 alleged redesign, and they must have been brought up to speed
4 on whether or not it was a fraud, a sham, or whether it was
5 fair and if it is a colorable difference, and I'm going to tell
6 Your Honor, and the documents will show when we get to the
7 substance of this, that this whole process was lawyer-driven,
8 that everything was lawyer-driven and, in fact, in some
9 instances, Lawson disregarded the lawyers' opinions and advice.

10 THE COURT: That's not the current counsel. That was
11 another law firm that was involved at that stage, as I
12 understand it. Am I not right about that?

13 MR. ROBERTSON: There were several law firms
14 involved, Your Honor. In fact, there was another lawyer,
15 Robert Crawford, who is subject to Your Honor's order, and they
16 haven't produced documents from Mr. Crawford.

17 THE COURT: Who is Mr. Crawford?

18 MR. ROBERTSON: Mr. Crawford was outside counsel in
19 Minnesota who was actually advising Lawson on the alleged RQC
20 design-around.

21 THE COURT: Is he in a law firm there?

22 MR. ROBERTSON: He is in a law firm. I think it's
23 called Crawford & Mauna. I'm not sure I have the pronunciation
24 right, but he is in a law firm there, and he was commenting --

25 THE COURT: Why haven't they produced those

1 documents?

2 MR. ROBERTSON: I don't know, Your Honor.

3 THE COURT: Have you asked them and talked to them?

4 MR. ROBERTSON: There are documents that were
5 communications from Mr. Crawford to Lawson, so it's clear that
6 they searched Lawson's documents and produced some of them, but
7 there are other documents that are in Mr. Crawford's possession
8 clearly --

9 THE COURT: Have you subpoenaed Crawford's --

10 MR. ROBERTSON: I prepared a subpoena on Monday, Your
11 Honor, but I didn't want to serve it before we had this
12 hearing. Quite frankly, I think that they should go to Mr.
13 Crawford and ask Mr. Crawford to voluntarily produce these
14 documents, because he's clearly an agent of the client and, as
15 defined in our document request, should have been produced.

16 THE COURT: Are you saying that the documents that
17 Crawford has about the redesign and control -- the redesign are
18 within the custody, possession, or control of Lawson?

19 MR. ROBERTSON: Absolutely.

20 THE COURT: Which one?

21 MR. ROBERTSON: I'm sorry?

22 THE COURT: Custody, possession, or control?

23 MR. ROBERTSON: I think all, particularly control
24 since he's an agent and since he communicated to them.

25 THE COURT: They're in the possession of Crawford.

1 MR. ROBERTSON: They are in the possession of Mr.
2 Crawford.

3 THE COURT: Okay, so we rule that out. Now we have
4 custody. Are they in the custody of Crawford or the custody of
5 Lawson?

6 MR. ROBERTSON: I think they're in the custody of
7 Lawson and Mr. Crawford, and I'll tell you why.

8 THE COURT: So there's joint custody.

9 MR. ROBERTSON: Yes, sir, because the documents that
10 the lawyer produces are the property of the client. That's,
11 you know, black letter law. So I think they are both in the
12 custody and control, and in some instances, since they, you
13 know, may have -- well, they have been -- a subset have been
14 given to Lawson, and a subset have been produced to us. But
15 there are still documents we believe that they haven't produced
16 concerning RQC development, because in a way, he was sort of
17 the outside critiquer of Lawson's attempted design-around of
18 the RSS infringing system, and he weighed in on a number of
19 things that Merchant & Gould recommended, and, you know, in
20 many instances it's quite revealing when he indicates that he
21 doesn't believe that the design that Lawson has come up with,
22 as guided by Merchant & Gould, is sufficient to escape
23 infringement.

24 So I think his documents are highly pertinent. I can
25 subpoena him, but I'd rather, given the fact he is an agent of

1 Lawson, have them go back and search for those documents and
2 produce them promptly.

3 More to Your Honor's point, there are documents also,
4 a handful, on the privilege log involving Gibson Dunn, and so
5 this is a year ago. I want the Court to appreciate that it's
6 been more than a year -- actually, I'm sorry, slightly less
7 than a year since the last iteration of the privilege log was
8 produced back in November of 2011, and the Court indicated in a
9 September 14th conference that given this was a subject matter
10 waiver, it had no temporal limitations to it.

11 In fact, the argument was made that they didn't have
12 to produce any documents after the release of RQC, and the
13 Court made very clear it didn't matter if it was prerelease or
14 post-release. In fact, there are many documents that are
15 post-release in which they're talking about whether RQC
16 actually avoids infringement, and there clearly could be
17 relevant documents hypothetically, because I haven't seen them
18 all, in which someone says, you know, that RQC really doesn't
19 avoid infringement, and we need to, you know, think about
20 something else.

21 Let me just give you one example if I can point to
22 it, and I don't want to belabor the process, but if you look at
23 page 13 of the PowerPoint, here's one that I find to be very
24 interesting. It's the third bullet point, sir. This was when
25 we filed the show cause for why they should not be in contempt,

1 and this is a point where Gibson Dunn had gotten involved, and
2 they were preparing -- and to be sure, I just want to make sure
3 -- this was Will Schultz was preparing a declaration.

4 THE COURT: Who is Mr. Schultz?

5 MR. ROBERTSON: Mr. Schultz was an attorney from
6 Merchant & Gould.

7 THE COURT: That's what I thought.

8 MR. ROBERTSON: Mr. Schultz was the one who wanted to
9 rewrite evidence law by saying he had hearsay on hearsay for a
10 document that didn't exist. Mr. Schultz was preparing a
11 declaration that was to be used with the Court to try and
12 defeat our show cause motion for contempt, and Mr. Dooner was
13 giving a declaration.

14 Now, Mr. Dooner is a Lawson employee who was involved
15 in the redesign, the alleged redesign, and one of the things
16 they argued --

17 THE COURT: Was Schultz preparing Dooner's affidavit,
18 or was Schultz preparing Schultz's affidavit?

19 MR. ROBERTSON: Schultz was preparing Mr. Dooner's
20 affidavit.

21 THE COURT: All right.

22 MR. ROBERTSON: And I actually have one of the
23 drafts. There are several drafts that were on the privilege
24 log that they haven't produced.

25 THE COURT: How do you have one?

1 MR. ROBERTSON: Because they produced one iteration
2 of apparently several. And in that draft --

3 THE COURT: Is this a document that was intended to
4 be filed publicly?

5 MR. ROBERTSON: Is this a document that was intended
6 to be filed publicly?

7 THE COURT: What is the Fourth Circuit law on that
8 kind of document?

9 MR. ROBERTSON: I think this --

10 THE COURT: What is the difference between that and a
11 10-Q?

12 MR. ROBERTSON: You are testing my memory, Your
13 Honor. I'm not sure whether the motion to show cause --

14 THE COURT: A document that's prepared with the
15 intent to be filed in the public doesn't have privilege in the
16 Fourth Circuit, does it?

17 MR. ROBERTSON: I think that's right, but this --
18 these were iterations that had attorney/client communications
19 back and forth as to what the substance of the declaration
20 would be.

21 THE COURT: I see.

22 MR. ROBERTSON: Okay. I just wanted to point out --
23 Your Honor asked me whether, you know, we think --

24 THE COURT: I got you off track. What part of page
25 13 are you talking about now?

1 MR. ROBERTSON: It's the last bullet point. So this
2 draft -- in fact, I have the document, actually, Your Honor, if
3 you want me to hand it up, the draft of the declaration. I
4 don't want to go through it at length, Your Honor, because I
5 know time is short.

6 Here's the important part. So one of the things they
7 say is a design-around, Your Honor, and I'm going to be testing
8 your memory now, but you remember, when you go through the
9 Lawson system, you can prepare a shopping cart that has the
10 items you want to buy that you're going to put in a
11 requisition, and then you're going to generate a purchase order
12 to buy it.

13 This document is dated September of 2011. Now,
14 that's five months, four months after Your Honor's injunction,

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 That's one of the three bases, they say, that they

25 [REDACTED]

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[REDACTED]

Now, you'll hear from our experts that that feature has not been removed, that they still have what's called a cache that holds the requisition items in order to put them on the requisition and then issue the purchase order.

So that's why I think, Your Honor, when you hear the substantive evidence, you will find that this is and has been a fraud on the court.

Now, Your Honor, I'm not going through a lot of Lawson's representations that they made to you about full compliance with Your Honor's February 20 order, but Mr. Thomasch did, in open court, say that if they lost at the Federal Circuit, he assumed complete production.

He also said it wasn't going to be difficult to figure out which documents Your Honor's order applied to. He also stated that as soon as their petition for mandamus was denied, they would commence the proceedings without delay.

Now, Your Honor, let me just show you -- in fact, while we're on page 13 -- a couple more examples. Here was a

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 In fact, you'll find out, Your Honor, from the
11 documents that have already been produced when we commenced the
12 contempt proceedings that Lawson rejected counsel's advice at
13 the time and did not remove the shopping cart cache.

14 So I'd like to move on to a couple of other
15 categories, if I could, Your Honor, that concern documents that
16 we believe were subject to the Court's order beyond the RQC
17 development.

18 THE COURT: Mr. Robertson, I'm going to tell you now
19 that I'm not putting any time limits on this proceeding today
20 because I want to get it right, and I don't want to spend a lot
21 of time doing it, so I want you to go through it in an orderly
22 way, topic by topic, so I can make a decision on this matter,
23 and I'm going to ask you to focus on one topic at a time, and
24 then we're going to Mr. Thomasch and let Mr. Thomasch address
25 that topic. That way I'll have a handle on exactly what needs

1 to be done and -- or if anything needs to be done.

2 So the thing I think we were talking about to begin
3 with was documents that are picked up in that part of the
4 February 21 order and opinion that hold that there has been a
5 subject matter waiver about the design and development of
6 RQC/RSS, and you finish -- get your presentation on that one,
7 and then I'm going to give Mr. Thomasch, or whoever is going to
8 deal with it, time to deal with that, and then I'll take the
9 next topic. That way we'll have an orderly procedure and an
10 orderly record.

11 You all are a lot more familiar with this than I am,
12 and it will help me if I have it compartmentalized a little
13 bit.

14 MR. ROBERTSON: What I've done then is given you, I
15 think, in that PowerPoint and those exemplary documents at
16 least 12 examples that specifically reference RQC. What I
17 represented to the Court --

18 THE COURT: Of 800, or are there -- there are
19 800-some that have these references or that do not have -- some
20 of which have references and some of which you think I should
21 infer they, in fact, pertain to the development because of the
22 nature of the entry and the time frame and the persons
23 involved?

24 MR. ROBERTSON: Yes, that's exactly right, Your
25 Honor. So what we've done is we've provided you with -- taking

1 their privilege log, and after they've completed their
2 production, we've given you a color-coded example. I believe
3 it's Exhibit A to the reply brief, and --

4 THE COURT: That's that disk.

5 MR. ROBERTSON: Yes, sir, and we're going to get that
6 printed -- we're going to attempt to get that printed out in
7 hard copy for you, but, yes, that's that disk.

8 THE COURT: How big is that going to be once it's
9 printed out?

10 MR. ROBERTSON: I believe their privilege log had
11 some 10,000 documents and was about 1,500 pages long? Maybe
12 more than 1,500 pages, but that's that disk.

13 What I've then done, to try and simplify the matter,
14 and I have a printout and I apologize, I only have one copy, so
15 I'm reluctant to hand it up to the Court today because I don't
16 have one for counsel, but I can get it to the Court tomorrow,
17 but I have a printout of 200 examples that is color-coded with
18 what we believe are clean examples of RQC documents that fall
19 within the Court's order.

20 THE COURT: And that's the one you want me to review,
21 your 200-sample documents.

22 MR. ROBERTSON: Yes, sir.

23 THE COURT: What would you have me do with the 200
24 samples? Find that because all of the 200 or any of the 200
25 meet your description, that they just have to produce

1 everything and let it rip?

2 MR. ROBERTSON: I think that would be -- yes, I think
3 that would be the just result, that if we give you examples of
4 200 and you find that there is a significant number of them, a
5 majority, whatever the Court deems in its discretion should
6 have fallen within the Court's order, at this point it should
7 be game over, and they should produce the entire privilege log
8 in its entirety.

9 THE COURT: Is there any authority that you have for
10 using the procedure of that sort to make this kind of decision?

11 MR. ROBERTSON: Um, there is, I believe -- I might
12 have the case wrong, but it's the -- the Court, this summer,
13 looked at 100 documents and found that they weren't privileged
14 and, I think, required an entire production, but I think the
15 authority is well within the Court's discretion given the
16 procedural status of where we are now.

17 I would not want to have to put the Court through the
18 burden of having to go through some 4,000-plus documents on a
19 one-by-one basis to make that determination, but if you find
20 based on --

21 THE COURT: I thought you said 800.

22 MR. ROBERTSON: Well, sir, there are 800 that we
23 believe -- 800-plus -- explicitly reference RQC within their
24 description, and there's that other --

25 THE COURT: There's another 3,200 or so that you say

1 are impliedly related or encompassed within the subject matter
2 waiver; is that right?

3 MR. ROBERTSON: Yes, sir. That's based on, you
4 know -- let me be clear. It's based on our informed surmise
5 and supposition given the cryptic descriptions, and, you know,
6 they write the descriptions, and the participants and the time
7 frame. That's our best estimate.

8 Now, there are a number of other documents, and I
9 understand the Court wants to do this in a structured fashion,
10 that we think there are bright line rules that we will address
11 later, like that are merely cc-ed to an attorney.

12 THE COURT: We'll deal with that category after we
13 finish with the subject matter waiver.

14 MR. ROBERTSON: Well, Your Honor, then I'm done with
15 my RQC argument. I've given you, I think, 12 examples in that
16 set of 30. I have other examples for other categories that
17 fall within the Court's order.

18 THE COURT: We'll get back to that.

19 MR. ROBERTSON: I have the list of 200 that I'll get
20 to Your Honor, but -- that I think demonstrate many additional
21 RQC documents that should have been produced and haven't been
22 produced and, therefore, at this stage of the proceedings
23 warrant sanctions, but I'll address those other categories as
24 the Court wishes as we proceed. Thank you.

25 MR. THOMASCH: Your Honor, Daniel Thomasch for

1 Lawson. It's frankly difficult to know where to begin other
2 than to note, and I'll note it first because in 31 years of
3 practice, this is the first time that this has happened, that
4 I've been accused of being part of a conspiracy and having been
5 engaged in some form of crime fraud.

6 Your Honor said --

7 THE COURT: We haven't got any papers on that, and I
8 don't have that -- that's not going to be considered right now.

9 MR. THOMASCH: That's what I wanted --

10 THE COURT: If we want to have to deal with that
11 issue, that issue has to be teed up directly. It has to be
12 specifically presented so that the lawyer and the client both
13 have an opportunity to understand and address what's going on,
14 and so does the Court. So let's go to the documents that are
15 being withheld that are claimed to be within the RQC waiver.

16 MR. THOMASCH: And I don't -- my argument is on the
17 facts here, and I want to deal with that, but Your Honor asked
18 a question about law of Mr. Robertson, and so just because
19 you've asked the question, I'll note for the Court that in the
20 case of *American National Bank and Trust Company of Chicago v.*
21 *Equitable Life Assurance Society of the United States*, 406 F.3d
22 867, Seventh Circuit Court of Appeals decided May 4th, 2005, in
23 that case, there was a process in which the plaintiff attempted
24 to do a little of what I understand Mr. Robertson now wants to
25 do.

1 The relief he just asked for, production of the
2 entire privilege log, actually goes beyond the relief he asked
3 for in his papers which is the production of some 4,500
4 documents, although I must say there's not that much difference
5 between the two because he has put virtually every document in
6 the log into what he calls RQC development.

7 But in that case from the Seventh Circuit, the
8 magistrate didn't want to go through the whole process of
9 looking at all of the documents, and so the magistrate judge
10 said to the plaintiff's counsel, you pick 20, and I'll review
11 those 20, and if I find five or more of them are not properly
12 privileged, then the whole log gets produced. And he found
13 five had not been properly logged, and he ordered the
14 production of all of it, and it went up, and unusual for a
15 discovery matter, it made into the Federal Court of Appeals.

16 And the Seventh Circuit reversed, said it was abuse
17 of discretion, said it was inherently arbitrary to let the
18 plaintiff's counsel select out the most favorable small
19 selection, and there was no reason to believe that those small
20 selection was representative of the larger sum of documents at
21 issue, and here, particularly where there's so many documents
22 at issue, I think that's particularly appropriate.

23 THE COURT: Did the Court comment on the procedure of
24 allowing both sides to submit an appropriate sample and then to
25 judge on the basis of a submission made by both sides?

1 MR. THOMASCH: That was not discussed in the case
2 because that was not the facts in that case.

3 THE COURT: Let me tell you my problem.

4 MR. THOMASCH: Yes, Your Honor.

5 THE COURT: This needs to be resolved. Has the
6 Federal Circuit set a date for the hearing on the merits of the
7 appeal yet?

8 MR. THOMASCH: Yes, Your Honor, on June 6th of this
9 year --

10 MR. ROBERTSON: June 8th. I argued it, Your Honor.

11 MR. THOMASCH: The record will reflect it. In early
12 June, Your Honor, the case was argued in the United States
13 Court of Appeals for the Federal Circuit.

14 THE COURT: It's already been argued.

15 MR. THOMASCH: It's been argued. It was argued
16 almost five months ago. So that case is proceeding on its own.
17 There is a related case in the Federal Circuit, because certain
18 of these claims were held ultimately in the PTO, after all
19 appeals were over, to be invalid, and ePlus has taken an appeal
20 of the invalidity over, so those are also pending. That has
21 not yet been argued.

22 MR. ROBERTSON: I'm sorry, Your Honor --

23 THE COURT: Mr. Robertson, let him finish, and you
24 can make notes and then I'll hear you. It just is helpful to
25 hear one person at a time. Then we get everything straight.

1 So the decision on the merits of the case is pending.

2 MR. THOMASCH: That one has been argued --

3 THE COURT: Then there is another case that is
4 related to it. It's the re-examination case, and it hasn't
5 been argued yet, or it has?

6 MR. THOMASCH: It has not been argued, and we do
7 not know whether --

8 THE COURT: Is one being held for the other; do you
9 know?

10 MR. THOMASCH: We don't know. There have been
11 letters to the Court about the relationship between the two,
12 but we do not know -- the Court doesn't tell us -- how it's --
13 whether it's going to be the same panel or not and whether they
14 will be -- whether the first will be held for the second. We
15 have no insight into that to offer.

16 THE COURT: All right. I want to get this finished,
17 and, I mean, it's a fairly simple matter to determine, it seems
18 to me, whether the privilege log, on its face, claims matters
19 that are related to or describes matters that are related to
20 the design of the RQC and produce those documents, and there's
21 no reason not to have produced every one of them by now.

22 MR. THOMASCH: I agree, Your Honor, and I think it is
23 fairly simple, and I'd just like to address it briefly, because
24 I think there's a point of difference between us.

25 THE COURT: What is the difference?

1 MR. THOMASCH: The difference is the word development
2 or redesign or design or any word that approximates that, and
3 so when he started his argument, Mr. Robertson said that Lawson
4 had taken a cramped and hyper technical response to the order
5 because we had limited things, our production, to the RQC
6 development, but, Your Honor, that is precisely what the waiver
7 is.

8 The waiver is the subject matter of Lawson's
9 development of the RQC module. So what we have here, every
10 document that deals with RQC does not deal with the development
11 of RQC, and I would say there's two enormous buckets that
12 encompass thousands of documents that are at issue here.

13 One is the rollout of RQC. RQC was designed, but
14 then it had to be rolled out. It had to be sent to the
15 customers who were -- had RSS and who were paying maintenance
16 on RSS. And so those customers had to be informed what was
17 going to happen.

18 RSS was decommissioned. When RSS was decommissioned,
19 that affected their ability to get service on it. They had to
20 be communicated with. There were enormous numbers of documents
21 that were generated about how to explain this to the
22 marketplace, what their rights are going to be, things of that
23 nature.

24 They don't deal with the development. Those aren't
25 developers. That's the communications, the marketing group and

1 the customer service group. They have to figure out how to
2 answer the phones. If someone says, I have a problem, what do
3 they say. That's not the development of RQC.

4 So there is the rollout of RQC to the public. There
5 is the sale of RQC to non-customers, how much are we going to
6 charge for it, how are we going to advertise --

7 THE COURT: Is that part of the rollout?

8 MR. THOMASCH: That would be part of -- that would be
9 generally part of the rollout. What I would think of as the
10 rollout is how do we commercialize and sell and deal with our
11 customer base about this new product in our product line.
12 That's number one.

13 Number two, another big bucket that encompasses large
14 quantities of documents here are litigation about RSS and RQC;
15 in other words, this case.

16 Now, I understood Your Honor's order, and, you know,
17 I don't want to say we're not involved to suggest that that
18 means that someone who was previously involved did something
19 wrong, because I don't imply that at all, but we weren't in
20 this case at the September 15th date. I'd never heard of
21 Lawson or been involved in this lawsuit as of that time. We
22 were retained after that fact. We weren't involved in the
23 creation of those documents. But there were documents that
24 were created --

25 THE COURT: Which documents?

1 MR. THOMASCH: Documents such as the draft Dooner
2 declaration and the comments from Mr. Schultz about what would
3 be in it or not in it.

4 There has been litigation that has been ongoing since
5 early September in front of Your Honor, September 2011, over
6 whether or not there should be contempt.

7 THE COURT: When did you get in the case? It's in
8 the record, but I don't have it.

9 MR. THOMASCH: In very early October. There were
10 hearings with Magistrate Judge Dohnal on somewhere in the
11 neighborhood of 8th, 9th, 10th of October. My personal
12 involvement began --

13 THE COURT: I'm talking --

14 MR. THOMASCH: The firm, I didn't initially take it
15 on, but I believe it was very early October. It could have
16 been the last day of September, but I believe it was the first
17 week of October.

18 At any rate, there has been litigation ongoing since
19 then about generally our contention that RQC is a separate
20 product from RSS and is different from RSS and is more than
21 colorably different from RSS, far more.

22 That litigation has been ongoing, and there have been
23 enormous numbers of communications about how to defend that
24 litigation. We do not look at that -- I have never interpreted
25 that, and I don't as I stand here, as being in the subject

1 matter of RQC development.

2 So that is a place where we differ dramatically as
3 between the plaintiff and the defendant over what is covered by
4 Your Honor's order.

5 As I understood Your Honor's order, you said that --
6 Mr. Robertson made a comment about the redesign was
7 lawyer-driven. Yes, the redesign was heavily influenced by the
8 lawyers, because the lawyers were involved in providing IP
9 advice.

10 THE COURT: Is it simply your contention that the
11 waiver that is mentioned, that is the subject of the order,
12 does not involve waiver about -- of the subject of RQC design
13 that is any discussion of that topic about how it was designed,
14 about how it was developed in the past, which discussion was
15 had with Gibson Dunn in defending the charge of contempt? Is
16 that your point?

17 MR. THOMASCH: Well, certainly I would take the
18 position that anything that Gibson Dunn has done to defend this
19 litigation that allowed us to investigate past facts and to do
20 that, that --

21 THE COURT: Who was defending the cases when these
22 depositions were taken?

23 MR. THOMASCH: When the depositions were taken, we
24 were, Your Honor. They were in January of this year. We began
25 in October of last year, and so when we prepared the

1 witnesses -- I think that's a good example. We prepared Mr.
2 Christopherson for a deposition. I would not have felt that if
3 Mr. Robertson wanted to be invited and attend that deposition
4 preparation session that he would be entitled to.

5 I would have thought I had a work product privilege
6 to meet with my client to discuss the defense of the
7 litigation, and if Mr. Christopherson testifies before trial in
8 this Court or a hearing in this Court on the contempt, I would
9 expect to prepare him beforehand, and I would not expect Mr.
10 Robertson to have a right to come or to ask his first question,
11 what did you do in preparation in talking with Mr. Thomasch.

12 THE COURT: Well, now, the opinion said Lawson waived
13 its privilege during the depositions of Mr. Christopherson, Mr.
14 Hagar, and Mr. Lohkamp.

15 MR. THOMASCH: Yes.

16 THE COURT: The development of the module was
17 carefully outlined in a document about which Mr. Christopherson
18 was questioned in his deposition.

19 MR. THOMASCH: Yes.

20 THE COURT: That is a document that was prepared
21 before that deposition.

22 MR. THOMASCH: And the documents that were prepared
23 were produced. They were treated as documents that were about
24 subject matter -- the development of the product. They may
25 have been work product. The issue becomes whether or not the

1 subject of the document was preparation for testimony or the
2 subject was the development, and I did view and I do view that
3 the subject matter waiver which, in the Fourth Circuit, is
4 supposed to be tightly constrained to the subject matter, the
5 subject of the development, I did not think would extend, for
6 instance, to preparing for testimony in this court in the
7 future.

8 When Mr. Christopherson or Mr. Dooner comes to trial,
9 they will be prepared, and I wouldn't think if I prepared a
10 witness outline to prepare my witness to testify about the
11 historical events, I would not think that that witness outline
12 had to be turned over.

13 If it does, it does, and it's an issue that we'll
14 have to preserve our rights and deal with later, but I will
15 say, Your Honor, in 31 years of litigation, I have never heard
16 of an order that went so far as to say that the preparation of
17 a witness for trial other than in a crime-fraud exception
18 situation. That would be different. If the attorneys are part
19 of a crime, that's a different story, but I haven't lost my
20 ability to prepare witnesses for trial simply because Mr.
21 Robertson alleges --

22 THE COURT: You are focusing on preparing people for
23 trial, and we haven't gotten to that point yet. Where is it
24 that you are drawing the distinction in these documents, Mr.
25 Thomasch, because most of these documents are Lawson documents.

1 They're not your documents.

2 MR. THOMASCH: Correct. That's absolutely correct.
3 Here's how we did it.

4 THE COURT: And it's Lawson that waived the privilege
5 here, and it may or may not have been done with consent, but it
6 was Lawson that waived the privilege.

7 MR. THOMASCH: Right. We have viewed the issue as
8 not being technical in any way. We have not done this. We ran
9 a search term, a phraseology that was a string of search terms
10 that were like, you know, a dozen terms long, this or that or
11 the other, because we wanted to make sure that we captured all
12 the right terms.

13 In addition, we read every document ourselves. We
14 read them, and we did a computer search to check our reading,
15 but we looked for redesign, development, redevelopment.

16 THE COURT: If the word doesn't appear --

17 MR. THOMASCH: No. That was just a flag --

18 THE COURT: -- that's the test?

19 MR. THOMASCH: No, that is not the test. If the word
20 did appear, if the word appeared in the log, we produced. We
21 did not produce, he says, 800 entries that say RQC. We did not
22 produce every document that says RQC.

23 We produced documents that said RQC development, RQC
24 design, RQC redesign, RSS redesign, RSS to RQC, anything like
25 that. If the words were on the log and Your Honor told me to

1 do this on September 14th, if the words were on the log, we
2 produced it.

3 THE COURT: Who is Jordan Ekelin? Let's look at --
4 you have his handout there?

5 MR. THOMASCH: I do, Your Honor. In-house counsel
6 for --

7 THE COURT: Paragraph two -- page two, excuse me.

8 MR. THOMASCH: In-house counsel at the time, no
9 longer with the company, I believe the general counsel of
10 Lawson. Not the general, I'm sorry, Mr. McPheeters was. Mr.
11 Ekelin was in-house counsel.

12 THE COURT: All right. Nancy Anderson is who?

13 MR. THOMASCH: I'm sorry, Your Honor, if I could ask
14 you where you are.

15 THE COURT: I'm sorry, document 804 on page two of
16 his slide. Sorry.

17 MR. THOMASCH: I have this --

18 THE COURT: I gave you the wrong document. Sorry.
19 That's my fault. 30 examples of Lawson's willful violation of
20 this Court's order, do you have that? Did you give him one
21 there, Mr. Robertson?

22 MR. ROBERTSON: Yes, sir. I'll see if I have another
23 copy.

24 MR. THOMASCH: I was using the PowerPoint, Your
25 Honor. That's my fault. I have 30 examples.

1 THE COURT: Page two of that, second document.

2 MR. THOMASCH: Yes, Your Honor.

3 THE COURT: It says, "RQC/RSS software migration."

4 What does that mean? To me, that's a term that was used in the
5 testimony here that had to do with the way that it functioned.

6 What does that mean and why is that being withheld? It sounds
7 like a document, even though it doesn't say development, that
8 relates to development.

9 MR. THOMASCH: Well, it says, "Re: RQC/RSS software
10 migration and customer service in anticipation of litigation."

11 THE COURT: Customer service in anticipation of
12 litigation is not the development of the RQC by its terms.

13 MR. THOMASCH: Correct.

14 THE COURT: Software migration is a term that was
15 used here, I think, that had something to do with the way the
16 product functioned. I may be wrong about that, but at least
17 there's some indication that maybe that's a document that ought
18 to be produced.

19 MR. THOMASCH: Let me tell you how we would have
20 dealt with this document.

21 THE COURT: All right.

22 MR. THOMASCH: The words -- there is nothing on that
23 that talks about development, redesign, or design, so we would
24 not have automatically produced it, but I can tell Your Honor
25 that we would have read it, we would have looked at it, and if

1 we believed that it related to the development of RQC, we would
2 have produced it. I don't have that document in front of me,
3 and I can't speak to precisely what that document says.

4 THE COURT: Why not? How come you can't remember
5 everything that's in every one of these documents?

6 MR. THOMASCH: I do -- I will note for Your Honor
7 that during the course of the day, we'll discuss three
8 different buckets of documents. This is the first, which is
9 the large one, of 4,500. In each instance, Your Honor, to
10 facilitate things, if you wish, we have brought down disks
11 appropriately marked that separate them by bucket as to the
12 documents that are in dispute so that to the extent Your Honor
13 wants a disk with the documents, we have brought them with us.

14 THE COURT: Next one down, 1376, "RQC performance."
15 Now, that doesn't say design and development, but given the
16 context of the issues here, RQC performance could mean how does
17 it work.

18 MR. THOMASCH: It could.

19 THE COURT: That certainly, in this time frame,
20 pertains to its development and design, more to its design than
21 its development. So I would say that one would be a jump-out
22 to me that would say produce the thing.

23 MR. THOMASCH: That would be a jump-out to me to say
24 read the thing, Your Honor, with all due respect.

25 THE COURT: Who read it? Who is reading these

1 things?

2 MR. THOMASCH: Well, we had them read by our team,
3 Gibson Dunn. It was a team of associates working on the case
4 working with myself, Mr. Mark, and Mr. Krevitt, and Mr. Lo as
5 well.

6 We had situations set up so that every document they
7 had a question on, they could email to us. We would then --
8 all the partners on it would look at it. I don't recall seeing
9 this particular document, but the work of going through --

10 THE COURT: You had a two-level review, a substantive
11 review. I understand you to say and be telling me that in the
12 case where there was a question created by the text of the log,
13 the privilege log that might implicate design or development of
14 RQC, that it was then substantively reviewed, that if it had
15 design or development in its text, you produced the document.
16 If it didn't have design or development in its text but had a
17 word in it such as performance which could legitimately be
18 construed to include design, you then had the document reviewed
19 by your team.

20 It first went to a team of associates, and once that
21 was done, a team of partners, a partner or some partners looked
22 at it; is that what you are telling me happened?

23 MR. THOMASCH: No, Your Honor.

24 THE COURT: Then I misunderstood, so tell me what did
25 happen.

1 MR. THOMASCH: I'll try to be very specific.

2 THE COURT: Because that's important. You are
3 putting your firm behind this.

4 MR. THOMASCH: I understand. I want to be very
5 specific about how this was done. First, we dealt with the log
6 itself. This was done -- when I say first, it's the first way
7 I'll deal with it, but because of your comments on
8 September 14th, we went back and did this. We had already been
9 working, but we looked at the log itself.

10 If the log entry said things such as RSS to RQC, RQC
11 development, RSS development, then we produced it
12 automatically, and we did that -- without regard to what the
13 document said at all. Forgetting about the document, just
14 because of the log entry.

15 Your Honor told me, you are stuck with it, and I
16 accepted that. And so we did it two different ways. We had
17 someone read through the log entries, and we also did a search
18 term through the computer on the log itself to see if those
19 words came up. If they came up, we produced the document
20 without reading it.

21 THE COURT: Okay.

22 MR. THOMASCH: Then, step two in sort of the logical
23 sequence of events, we read every document that plaintiffs put
24 on their list of disputed documents. We read 100 percent of
25 them.

1 That first reading was done in the first instance by
2 associates at the law firm of Gibson, Dunn & Crutcher. We
3 didn't outsource it, we didn't hire contract attorneys, we
4 didn't give it to paralegals --

5 THE COURT: It was done by associates, and you gave
6 them instructions how to do it.

7 MR. THOMASCH: We gave them instructions. I was
8 involved in giving the instructions, but we gave them
9 instructions. We instructed them that where there were close
10 judgment calls, to err on the side of production, but we did
11 leave those judgment calls to them.

12 We also then had a procedure where every night they
13 would call in, and they would raise questions. They would not
14 flag every document that had words in it. They were making
15 decisions produce or not produce, but where they had questions
16 about how to do it and often questions that might impact many
17 documents, what do we do in this sort of situation, we had a
18 conference call, and I would be part of that conference call.

19 Mr. Mark was an integral part of that process, Mr. Lo
20 was a part of that process, and we spoke about the documents
21 and what decisions would be made, and then we would make, in
22 effect, a ruling. We talked about the commissioner's office.
23 We'd make a ruling, and that would apply to all the documents
24 that they were reviewing.

25 We -- could mistakes be made in the course of

1 reviewing 4,500 documents? Yes, they could. Did I try to set
2 up a system so that we would capture those mistakes? Yes.

3 If there are documents not produced, I would say that
4 a small number of them -- and I don't believe that there are.
5 I believe we produced properly, but if there are documents, I
6 would say the small percentage of them would be someone made an
7 error in executing on the directions, and I would say in large
8 part it would be we did not understand the order to go so far.

9 When we saw the word subject matter of RQC
10 development, we understood that. The context of this, Your
11 Honor, was an alleged fraud. Not fraud on the court by the
12 lawyers but an alleged fraud in making and passing off a
13 product that only had cosmetic differences. That was their
14 claim.

15 Their claim was that you just put lipstick on a pig,
16 they like to say, that you just had -- you just made minor
17 cosmetic, and then you put it out, and you knew it was the same
18 product. So that led to this question about the developmental
19 timeline, and the key timeline was between February of 2011
20 when, after the jury verdict, the project to redevelop RSS or
21 to develop RQC came online, and June 9th of 2011 when the
22 product was fully commercialized and out to the public, and
23 that was, I will say, Your Honor, that was entirely our focus
24 back in February.

25 THE COURT: But you've gone beyond that.

1 MR. THOMASCH: But we've now gone beyond that. We
2 had to go back and redo it because of Your Honor's
3 instructions, and, indeed, I'm sorry -- we had started to redo
4 that ahead of time, because in the meet-and-confer process, I
5 told Mr. Strapp at the time and Mr. Jacobs -- Mr. Robertson was
6 not part of those discussions, but I was, and I spoke with Mr.
7 Strapp and I spoke with Mr. Jacobs, and I said, if you give us
8 a list, we will review every document you put on the list.

9 And they gave us, interestingly, lists in two ways.
10 They started out with initial lists, and I think in this
11 category there were like 200 documents. And then I told them
12 we would review every one, and we got a list of 4,500.

13 I must say, for 24 hours, I didn't know whether I was
14 going to maintain the position that we would review them all.
15 I told Mr. Strapp, I said, I haven't gotten my hands around how
16 I even approach what you've now dumped on me, because I'm
17 stumped, and then we went back and we said, we will review
18 every one, and we did review every one, and we had done that,
19 and we were doing that by the time that we had the phone call
20 with Your Honor. But their motion intervened in that process.

21 This is a process that lawyers could have worked out
22 down to maybe a small nub, and then we could have come to Your
23 Honor for guidance, but the goal here wasn't to work it out and
24 get down to a nub. The goal was to run to court and scream
25 about Lawson.

1 THE COURT: All right, well -- I'm trying to stay out
2 of these kinds of attributive motivational remarks and resolve
3 the question on the basis of its merits.

4 Let's look at the third page of his exemplary group,
5 3853. It's a document discussing source code.

6 Now, perforce, it doesn't have, or by definition it
7 doesn't have design or development in it, but the source code
8 is really the guts of how all this stuff works according to the
9 testimony at trial. That may be -- that's a nontechnical
10 description.

11 MR. THOMASCH: Right, I understand.

12 THE COURT: How can you have the design of this RQC
13 not include a discussion of the source code? And so that
14 certainly has -- looks like on its face it is something that
15 ought to be produced in terms of the way the case was
16 litigated.

17 MR. THOMASCH: The only thing I say to Your Honor is
18 I don't have that document here, and I would say on its face it
19 looks like it needs to be read. The document needs to be read,
20 but to say discussing source code, I have no living clue what
21 that discussion was about, and I do not know that in any way,
22 shape, or form that discussion -- I mean, I note that the date
23 on it is September 23rd, 2011, and I think that -- we went back
24 and we looked at documents later, and documents that would have
25 dealt with sort of historically how we got here or what the

1 development was, how we developed it, any of that came into
2 place and was produced and --

3 THE COURT: How about the next one, 5279, RQC upgrade
4 plan, May 27, 2011. That's what was going on here allegedly.
5 You all were upgrading --

6 MR. THOMASCH: We were. I don't know that document,
7 but based on that time frame, I would very much think that that
8 was leading up to the webcast to the customers.

9 We had a webcast for the customers to tell them about
10 the rollout of the new product. I would very much think this
11 was related to that.

12 THE COURT: And if the rollout, of course, mentions
13 in any way the difference between the two, then you're talking
14 about the development of documents dealing with the development
15 of RQC.

16 Let's suppose that your rollout document says to
17 Payne who is buying this stuff, this is what was sued upon,
18 this is what you are getting, this is the difference. You have
19 then discussed the development and design of exactly what it is
20 that's at issue in the case, and you've waived the subject
21 matter of it, it seems to me. Did you all look at it that way?

22 MR. THOMASCH: I don't think we looked at it --

23 THE COURT: Don't you see that? You don't agree with
24 that?

25 MR. THOMASCH: No, I don't, with all due respect.

1 THE COURT: It's all right.

2 MR. THOMASCH: I do not agree with that. I think
3 that is actually very much wrong. If, for instance, we sent
4 out a document to our customers that said, we're going to make
5 RQC available to you at no charge on this date, you will note,
6 for instance, that in RQC you can only search to the class
7 level, not the commodity level of the -- using UNSPSC codes.
8 If we said that, that would comment on an objective difference.
9 It wouldn't say anything whatsoever about how we got --

10 THE COURT: That would comment on the design of RQC.

11 MR. THOMASCH: Excuse me?

12 THE COURT: That would comment about the design of
13 RQC.

14 MR. THOMASCH: It would comment on the design, in a
15 sense the finished product, and everything we send out by way
16 of marketing literature will, at some point, discuss the
17 qualities of the final product.

18 THE COURT: Don't you --

19 MR. THOMASCH: I view that as very different than the
20 development of the product which is -- which, in my mind, was
21 aimed at why were we making these changes, were they fraud or
22 were they a good-faith attempt to try to remedy the problems of
23 the infringement.

24 THE COURT: I understand that, but what you said
25 about it certainly is pertinent information to them in testing

1 the validity vel non of what it is you say in court.

2 MR. THOMASCH: But there is absolutely no -- the
3 problem here -- I shouldn't say it's the problem, Your Honor.
4 What frustrates me, I will say, is that this ties back, in
5 effect, to *TiVo*.

6 The differences, the three differences between the
7 products are not in dispute. They're real, they exist. We say
8 they make them more than colorably different and
9 non-infringing. And they say they're not more than colorably
10 different and they are infringing.

11 THE COURT: Mr. Thomasch, please understand that
12 somebody who has -- with respect to somebody who has to decide
13 this issue about whether they do or not, whether there's a
14 colorable difference, one of the things that's important is
15 whether the people who designed it thought there was a
16 colorable difference.

17 MR. THOMASCH: Correct.

18 THE COURT: And in deciding what those people say,
19 what they said earlier -- what they say in court, in deciding
20 what they say in court and whether it's true or not, what they
21 said in the past is pertinent, too, not just in deciding
22 whether to believe them but in deciding whether there is a
23 colorable difference, and I think maybe you are taking a fairly
24 restrictive view of the way that *TiVo* has to work and the way
25 it works in the mind of a decider of these issues.

1 It isn't only confined to -- it's certainly important
2 to know what happens with the experts and what the objective
3 differences are, and maybe that's the ultimate resolution, but
4 important to it is what was going on at the time.

5 MR. THOMASCH: Obviously Your Honor is the decider,
6 and you will decide what is important to you. I don't see
7 anything in *TiVo* that supports the notion that -- these are
8 different people. The people involved in the rollout are
9 different people from the people who are product designers.
10 Those two Venn diagrams don't overlap in any substantial way.

11 THE COURT: But the common denominator is the lawyers
12 who were involved in both. That's what you are dealing with.

13 MR. THOMASCH: Well, there were in-house counsel that
14 were involved in both.

15 THE COURT: Right. That's waived -- if it relates to
16 the subject matter of the waiver, it's waived. Let's look at
17 document 6437. RQC differences. Next one, 8442, changes in
18 compliance with injunction. Changes in what? The RQC is what
19 it seems given that that's what the issue is.

20 MR. THOMASCH: Individuals could have a question. If
21 someone put a question in, and we had lots of these questions
22 about who will pay for training, questions about how much --
23 how are you handling service, questions about that --

24 THE COURT: Doesn't have anything to do with the
25 case.

1 MR. THOMASCH: And we don't think it has anything to
2 do with RQC development.

3 THE COURT: But that doesn't mean that something else
4 in the document doesn't have something to do with it.

5 MR. THOMASCH: You are correct. All I can say with
6 these entries is that these entries do require -- they are not
7 something where I could stand here and say, on its face, it's
8 not waived, I don't have to read the document. I agree I have
9 to read the document.

10 THE COURT: How about these drafts of the affidavit,
11 Dooner affidavit, number 1438 and 5585?

12 MR. THOMASCH: I think -- I don't know precisely
13 without looking at the whole list of documents, but I believe
14 that most of the outside counsel's discussions with the clients
15 about testimony in the case or submissions of court documents
16 in the fall and later, of 2011, I think they would have been
17 viewed as the subject matter, I think would have been viewed as
18 the litigation and not the development of anything.

19 At that time, at the time that was done --

20 THE COURT: But you produced this --

21 MR. THOMASCH: That's why I say it may be -- I don't
22 know -- I have to go back and go through the whole process to
23 determine how an individual document got produced. There are
24 20 copies of many, many documents. In a world in which
25 everything is electronically stored and emailed around between

1 people, the number of duplicates is stunning, and they aren't
2 eliminated in the system. Different people have them on their
3 hard drives.

4 THE COURT: Then produce them. There's not one
5 difference between that and the old days before we ever had
6 electronics. We had more different copies of documents running
7 around once the Xerox got going, and that was more -- there was
8 more when the old carbon copy got going and the Ditto machine,
9 mimeograph machine.

10 MR. THOMASCH: Multigraphs, yeah.

11 THE COURT: That's just a function of the development
12 of technology, and the law has been since there were copies,
13 produce them all.

14 MR. THOMASCH: And we did.

15 THE COURT: You didn't do this one.

16 MR. THOMASCH: Well, we produced that one. We may
17 not have produced -- but I don't know whether we produced that
18 one in error or not.

19 THE COURT: You didn't produce 5585, and you didn't
20 produce 1438, but you did produce one iteration of that
21 document -- of both those documents.

22 MR. THOMASCH: As I said, Your Honor, the two big
23 areas in which I think account for the lion's share of the
24 documents are documents that relate to the rollout or the
25 commercial -- the sale of the product as opposed to the

1 development, how do we support it, how do we sell it, and
2 documents that relate to the litigation itself, and it may be
3 that Your Honor is -- I did not, and as I stand here today, I
4 do not read the subject matter of RQC development as
5 encompassing the way you defend the litigation.

6 I may be wrong, but I would have thought that was a
7 crime-fraud exception and only a crime-fraud exception. This
8 is a scope of waiver that I don't think is narrowly constrained
9 as the Fourth Circuit mandates, but we will -- we will honor
10 whatever ruling Your Honor makes.

11 We are not -- I have spent since I got into this case
12 with a number one goal of getting past the problems that I
13 viewed prior Lawson counsel had with trying to worry about what
14 got disclosed and what didn't. I wanted to produce them,
15 produce them as fast as I could and get by all that, and when
16 this issue arose, I could not have done anything more to tell
17 the plaintiff's counsel that I will work with you, and I will
18 go through it, and I'll review them all.

19 Now, there may be places where they say, no, Judge
20 Payne's order requires this, and I think it doesn't. Then we
21 could come to the Court and ask for a ruling. I don't know why
22 it all has to be sanctions. I don't know why it all has to be
23 with this tone.

24 These are tough issues, and waiver, I just can't
25 assume everything is waived or I get hit with an argument that,

1 well, you overproduced and you waived again. The waiver issue
2 is still very real, and I'm trying to do our best to figure out
3 how to handle that. And if we've made mistakes, we will go
4 back and deal with them, but it is not because we are trying to
5 selectively produce a document, hide a document, or anything
6 else.

7 We've produced 4,000 privileged documents. I don't
8 think the other 4,000 matter a wit in the overall scheme of
9 things, but if I produce them, it will be a waiver. So I'm
10 stuck. I need -- we'll have this issue with the next two
11 categories. I have very discrete rulings.

12 I just want to make sure that Your Honor's ruling
13 understands the issue and orders me to produce it so that no
14 one later says, you didn't need to produce that.

15 THE COURT: Mr. Thomasch, I understand that, but let
16 me tell you something. I haven't, in 40-something years of
17 practicing law, come across a situation in which lawyers can't
18 construct different meanings out of different words in judges'
19 orders, and we're beyond that in this case. It can't be done
20 that way.

21 I may have to have a special master appointed to look
22 at these waiver documents, and I think I'm going to have to do
23 it, but it's going to slow the case down. I want to get to the
24 question about whether your company did what it allegedly did,
25 and I would assume your client wants to get to there, although

1 Mr. Robertson says your client is out there selling this stuff
2 and profiting by it, and, therefore, it's not to your advantage
3 to move this thing along.

4 MR. THOMASCH: Your Honor, we were all within a week
5 --

6 THE COURT: I'm assuming you have segregated your
7 sales records so that all of your profits can be taken away
8 from you if that's the necessary result in such a way that that
9 can be done. So I guess that's the -- but somewhere along the
10 line, you all have to decide, each of you, do you want to get
11 to the playing field or not, or do you want to have these
12 skirmishes and -- we need to sort this out, and I don't know
13 how -- what do you think about the process --

14 MR. THOMASCH: We have taken virtually no discovery.
15 The plaintiffs wanted massive discovery. The request for
16 privileged documents has delayed us. We are not the cause of
17 the delay. Mr. Robertson wants these materials. It takes --
18 then that adds time into the process.

19 THE COURT: They're not the one who makes --

20 MR. THOMASCH: We have -- delay does not benefit us,
21 Your Honor, but a process by which we understand what the
22 issues are in the case -- I mean, that's the part that we're
23 most interested in, is the six letters that we wrote from
24 February 29th -- when we were here in front of you, you
25 directed the parties to do something, and for a month, nothing

1 happened from the plaintiffs about what was the post-TiVo
2 procedure. You asked us, how do you define the animal --

3 THE COURT: That's a different issue.

4 MR. THOMASCH: It is, but that is what we want to get
5 to, Your Honor, and I think a special magistrate is a good
6 idea. I must say that when we had the conversation on
7 September 14th, things you said caused me to go back and
8 re-instruct our group, and we produced hundreds of additional
9 documents as a result, and then we produced attachments that
10 related to them and the like.

11 Your Honor has made comments today that, again, I
12 feel as though there are places where you are reading this
13 order in a way that, in my mind, if you had said the subject
14 matter of the waiver concerns RQC, I would understand, but I
15 don't understand where the line is drawn between a document
16 that relates --

17 THE COURT: Rollout of RQC, you're not waiving the
18 privilege about that, because that's not part of the
19 development of RQC, but if in the process of talking about the
20 rollout of RQC you discuss the design and the development, then
21 that part of what you've done is waived.

22 MR. THOMASCH: And --

23 THE COURT: Do you understand?

24 MR. THOMASCH: I do, Your Honor. I hope you can
25 appreciate that in good faith I see a big difference, not a

1 lawyer's difference, a real difference between --

2 THE COURT: I hope it's a lawyer's difference. It's
3 what you get paid to do.

4 MR. THOMASCH: You just said the development and
5 design of the product, and I will tell you that in final
6 marketing literature, every one of those documents will relate
7 to the design. It will tell you what features the final
8 product has.

9 I don't view every document that says what the
10 product is to be a document that says what the development of
11 the product was, because necessarily you had to develop it
12 before you could sell it, but you just used development and
13 design in the same sentence three words apart.

14 The order said the development, and I do read
15 development to mean the process by which you do something and
16 retrospectively what it was that you were doing.

17 THE COURT: What do you do in the process of
18 developing?

19 MR. THOMASCH: You analyze --

20 THE COURT: You design. The design is the central,
21 one of the central components of development. Development is a
22 broader term that includes design.

23 MR. THOMASCH: And to be clear, if we were talking
24 about RSS design or RQC design while we were doing the product,
25 we absolutely produced that. I view that as in development.

1 The act of designing the product is totally development, but
2 when the product is sold in the marketplace, you can't sell a
3 product without saying what its features are, and every one of
4 our products, every single piece of commercial literature we
5 have about our product --

6 THE COURT REPORTER: Mr. Thomasch.

7 MR. THOMASCH: I'm sorry. Every piece of commercial
8 literature we have and every discussion we have about the
9 finished product will discuss the design features, but they
10 won't say how we got there or why we got there. They'll just
11 say what they are, and it's not even in dispute what they are.

12 THE COURT: I understand that. That's different.

13 MR. THOMASCH: I still don't understand if Your Honor
14 is saying if we identify what the feature is, and it's a
15 feature that --

16 THE COURT: I didn't say if you identified the
17 feature. I didn't say that at all.

18 All right, let me ask you this: What if I took 200
19 documents from you and 200 documents from him, each of you
20 select your best shot that you think is illustrative, would
21 that be an acceptable, appropriate way to try to resolve the
22 dispute short of having some special master appointed that
23 would review every single document, or I review every single
24 document?

25 MR. THOMASCH: Your Honor, I do not believe that a

1 sample can be used to then make rulings on documents that no
2 one ever looked at. I do think, Your Honor, that as a
3 practical way out of this --

4 THE COURT: We select presidents on the basis of
5 samples.

6 MR. THOMASCH: I still believe everyone's vote
7 counts.

8 THE COURT: Well said.

9 MR. THOMASCH: And in this state more than most.

10 THE COURT: Unfortunately.

11 MR. THOMASCH: Your Honor, I would say as a workable
12 way to go through. You have, again, enlightened me with your
13 views on this subject. I cannot tell you that I believed that
14 the judgment calls we made were made in conformity, precisely
15 with the way that you have just articulated it.

16 That is a more expansive view than I understood even
17 after September 14th, and if I'm dense, I'm dense, but I honest
18 to God did not understand that you would go that far, but I
19 think I understand where you are --

20 THE COURT: That I would go that far?

21 MR. THOMASCH: You wrote the order very carefully,
22 and I thought I understood the reasons for it. So I would say
23 that the thing we should do is we should look at these and see
24 whether or not one more time, see whether we should purge and
25 voluntarily produce certain documents.

1 I don't know whether there are any. We've gone
2 through this a lot carefully, and I don't know there are any
3 that we're going to give up on, but I think we should do it one
4 more time to look at it.

5 Then I think it would be useful for you to get the
6 samples of 200 each because it's a starting place. I do not
7 agree that your findings there should allow you to extrapolate
8 to the whole thing. On the other hand, if you looked at those,
9 and you came to the conclusion, as I think you will, that we
10 don't -- we're not holding back documents that relate to it,
11 well, then I think plaintiffs will have failed to make their
12 showings, and I think at that point you can deny the motion.

13 So I do favor the 200/200 approach, but I think that
14 we have to be careful --

15 THE COURT: So you want it structured in a way within
16 which you prevail if it comes out one way but they don't
17 prevail if it comes out the other.

18 MR. THOMASCH: Your Honor, I do think as a litigant
19 that's a good way to look at the situation.

20 THE COURT: Yes, it always was. We're going to take
21 a recess, because the court reporter is going to fire me and
22 you if we don't stop. We'll take 20 minutes.

23

24 (Recess taken.)

25

1 THE COURT: All right, anything else, Mr. Thomasch,
2 about the RQC?

3 MR. THOMASCH: Yes, Your Honor. I did want to
4 mention one thing on RQC and particularly in regard to the
5 trying to get understanding and guidance at this point really.

6 I talked about the two buckets that I was
7 particularly interested in. There are, obviously, other
8 documents, but the rollout documents and the litigation
9 documents.

10 On the litigation documents, I just want to go back
11 to that momentarily, Your Honor, because at pages eight to nine
12 of your February 21st order, you found that we had, indeed,
13 claimed certain documents were prepared by specific attorneys
14 in anticipation of litigation, and with respect those entries
15 the privilege is not waived, and then you discussed the issue
16 in regard to the development of RQC at page 22 of the
17 February 21st order. And there you say in dealing --

18 THE COURT: Where are you referring me, page 22?

19 MR. THOMASCH: Your February 21 order, page 22. Page
20 22, you discuss whether or not documents relating to the
21 development of RQC were done in anticipation of litigation, and
22 in the middle of the page, there's a sentence that reads, "The
23 record shows that the documents at issue here were not
24 'prepared in anticipation of litigation.' Rather, they were
25 drafted to help Lawson create a new product that it could

1 market to consumers. Here, the documents at issue reveal the
2 fact that lawyers were involved in RQC's development and the
3 fact that those lawyers recommended that specific changes be
4 made to RSS. On this record, Lawson has not established that
5 the work of the lawyers was in anticipation of litigation even
6 though it was done during litigation. Hence, Lawson has not
7 shown work product protection of the documents dealing with the
8 development of RQC."

9 So I will say to the Court that is where I was taking
10 the notion that the development of RQC was, in this time
11 period, where recommendations were being made and the product
12 was, in effect, being developed, and I understand, and I'm not
13 trying to talk about subject matter waiver, but when we get
14 into September of 2011 and forward, there was actual litigation
15 on this issue.

16 And so even if the subject matter waiver continues
17 unabated, the attorney opinion work product doctrine protects
18 documents where there was opinion work product in anticipation
19 of litigation or during litigation, and once --

20 THE COURT: Not or, and.

21 MR. THOMASCH: Yes. Once we were in September and
22 the plaintiffs have brought on their, I think, ill -named
23 motion for order to show cause --

24 THE COURT: When was the motion for show cause filed?

25 MR. THOMASCH: That was filed in September, I

1 believe. I would defer to plaintiff's counsel. It was filed
2 before I was involved --

3 THE COURT: There's a docket in front of me.

4 MR. THOMASCH: The other thing is, of course, as Your
5 Honor certainly is familiar, your own decision in the *DuPont*
6 case makes clear, opinion work product is only waived to the
7 extent of a document-by-document basis where it is waived, and,
8 again, that's why we do not agree and can't agree to a process
9 by which some hand-picked number of selected documents would
10 lead to an order that would apply to documents that hadn't been
11 reviewed, because -- particularly when so many of the documents
12 involved claims of opinion work product, we do believe they
13 need to be reviewed.

14 We don't object to any process by which, if Your
15 Honor wants to see documents, they are provided. There are
16 smaller sets that would be easy and we can get Your Honor
17 today. The plaintiffs have put in -- you know, have in their
18 reply memo 16 or so documents. We have a dozen or so documents
19 in ours. We have those we could put on disk and send over to
20 the Court this afternoon for *in camera* review.

21 They're the ones they selected and we selected for
22 the purpose of briefing to give you an idea of what they look
23 like. That might inform Your Honor if Your Honor was making
24 any order.

25 I think the long-term resolution of this, which,

1 hopefully, is not actually in the long term, but the complete
2 resolution of this should be a two-step process by which we
3 review the documents again. I actually think if you look at a
4 small section, gave us more instruction --

5 THE COURT: 28 documents, is that what you want me to
6 look at?

7 MR. THOMASCH: I believe it's 12 and 16. I think
8 it's 28, within a document or two either way.

9 THE COURT: I would prefer to see hard copies of
10 things. I don't like to read --

11 MR. THOMASCH: We can easily do hard copy. That's a
12 very manageable number. These are mostly emails, short
13 documents. It's the ones that are in their reply brief. It's
14 the documents that were identified in their brief that we have
15 not produced and the documents that we identified that were on
16 their log that we say have anything to do with development. It
17 would be that sampling.

18 We could get you that. I think eventually, though,
19 if the plaintiffs want to pursue this 4,000 document grab, I
20 think it has to go to a special master and have the documents
21 looked at.

22 THE COURT: All right.

23 MR. THOMASCH: Thank you. And I don't know if it is
24 all 4,000. Mr. Robertson himself broke this into two
25 categories. He said 800 of them mention RQC, and, of course,

1 we did not produce everything that mentions RQC. It was RQC
2 development, design, redesign, but I don't know whether we're
3 down to that 800 or whether he's still saying there's some
4 implied reference in regard to a broader total. 800 is a much
5 more workable number, but I'm not sure where the parameters of
6 his motion are at the moment.

7 THE COURT: All right.

8 MR. ROBERTSON: Thank you, Your Honor. Just briefly,
9 I want to start with a fundamental premise, and that was, after
10 Your Honor granted the show cause motion, you permitted us to
11 pursue discovery with respect to design, development, and
12 launch of RQC, and we were very focused on that. We just had
13 20 or so document requests.

14 We limited it in time from after the jury trial until
15 going forward as of -- I believe the document requests were
16 September 18, 2011. And so by definition, the documents that
17 are on the privilege log were responsive and relevant to our
18 document request concerning RQC.

19 So I think we start with that fundamental premise
20 that basically says that they reviewed those documents,
21 determined that they were relevant and responsive, but also
22 determined that they were privileged, and now the privilege has
23 been waived with respect to that.

24 And it was Gibson Dunn that prepared the privilege
25 log, four iterations of it, you will recall, and it was Gibson

1 Dunn that created the descriptions for those documents when
2 they did it after four -- presumably after reviewing them four
3 times in order to provide them to Your Honor.

4 So we think by definition they are responsive to our
5 requests, and they would fall within the Court's order. Now, I
6 thought Your Honor actually hit on the fundamental point here
7 and that we are in a court of justice, and this is a search for
8 the truth. So the question is whether or not they are saying
9 one thing to the Court and perhaps even one thing to their
10 customers and then saying something completely else internally
11 or to their lawyers as about what the differences are between
12 RSS and RQC if there are any.

13 They keep bringing up this lipstick-on-a-pig issue as
14 if I made that phrase up. That was in their documents. I
15 didn't create that phrase. Let me tell you another document
16 that they produced which I thought was interesting, and it's
17 going to come up in the next bucket of documents we're talking
18 about.

19 It was a document that was authored on June 9, 2011.

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 relevant, Your Honor, because apparently there was a series of
4 questions that were issued as to what they tell the public when
5 they launched RQC, because they wanted to minimize fears among
6 their customers that there were going to be significant
7 changes. We've seen other documents that we gave to Your Honor
8 in our motion that said, for example, one sales rep to a
9 customer. There's not anything that's really changed in RSS,
10 but we're not allowed to tell people that.

11 So the documents are going to show, Your Honor, that
12 there is not one thing they changed. I'd like to come back to
13 this point, though, about the descriptions that are in the log
14 that Gibson Dunn authored, and I just had a couple others, and
15 just, you know, to show you how relevant these are, this is at
16 page seven through nine of our reply brief, and a few of them I
17 have included in the 30 exemplary documents I provided you.

18 But here's document number 6798 at page seven of our
19 brief, description, "discussing RQC upgrade." Now, how they
20 can claim that doesn't have to do with the development, design,
21 and launch of RQC, I don't understand.

22 Also -- this is at page eight, document 7609,
23 "conveying legal advice regarding RQC code"; page nine,
24 document 2424, "email chain with attorney William Schultz
25 discussing legal advice concerning RQC source code."

1 Now, one of the documents I cited to you before that
2 actually you raised, Your Honor, was document 3853. You raised
3 that with Mr. Thomasch. And you'll see it says, "discussing
4 RQC source code." Mr. Dooner is listed as one of the
5 recipients. Mr. Dooner is the Lawson employee who wrote the
6 source code, and you will hear, when you hear the evidence,
7 that less than one percent of the source code from -- in RQC
8 was changed from RSS. That's after we confirmed what the
9 source code was.

10 So if you start with the premise that our document
11 requests were all aimed at RQC, then all of the documents in
12 there are responsive.

13 So, Your Honor, I don't think I'll belabor that point
14 anymore. I would just ask, Your Honor, given that there have
15 been significant delays in here, appointing a special master
16 would just delay these proceedings further.

17 THE COURT: What do you say that I should do to solve
18 the problem, Mr. Robertson?

19 MR. ROBERTSON: I would suggest --

20 THE COURT: The Fourth Circuit counsels us that we're
21 to be careful because of the purposes served by the
22 attorney-client privilege and the work product doctrine and how
23 we deal with that and how we make the decisions, and I don't
24 know of any authority that says you can take a sampling and
25 decide -- and then infer everything fits the bill of the sample

1 and make a decision on that basis.

2 If I could, I think I'd be inclined to do it because
3 it's a simple way to resolve the problem, and I think that the
4 decision that Mr. Thomasch mentioned, I think I actually
5 remember reading a decision when it came out and was struck by
6 some of the language about how, if it's the case I'm thinking
7 of -- I haven't looked at it since he cited it -- how arbitrary
8 it was to take five, a sample of five and only from one side
9 and how unfair all of that was.

10 And I think I would agree with the premise of that
11 decision anyway if it's the one of which I think I recall. But
12 what authority do I have to do anything other than send --
13 either I do it or I send it to a special master.

14 MR. ROBERTSON: Well, Your Honor, I do think if we
15 provided 200 documents as a statistical sampling, and Your
16 Honor started to look at those documents and started to find
17 that the overwhelming majority of them were subject to the
18 waiver given what the document requests were directed to, and,
19 you know, it would be fine if Lawson's counsel provided Your
20 Honor with 200 documents. I suspect they'll go through the log
21 and pick whatever relevant documents they can find, because I
22 will tell you, and we said it in the papers, some of the
23 documents that we're turning up as privileged included, for
24 example, a memorandum on their social networking policy for
25 employees. They turned up a bill from Skadden Arps on --

1 THE COURT: That kind of thing happens in large
2 litigation. I took a deposition of a guy one time and had a
3 great deal of fun with him by taking out a picture from *Playboy*
4 that he had in his files, and they produced that as privileged
5 and confidential, extra confidential, but, you know, that
6 happens, and so it makes for good cocktail conversation, but
7 beyond that, we shouldn't really be making decisions on it.

8 MR. ROBERTSON: But it was represented to you, Your
9 Honor --

10 THE COURT: Unless that's typical of the production.

11 MR. ROBERTSON: If they have any of those, Your
12 Honor, I'd ask they be produced forthwith.

13 Your Honor, what I'm hearing from Mr. Thomasch is not
14 only did they review this four times before Your Honor even
15 ruled on this for the four privilege logs, they went back and
16 reviewed it again thoroughly, and here we are still missing
17 documents that clearly fall within the scope of Your Honor's
18 ruling.

19 THE COURT: His view is that the ones that you say
20 clearly fall within the scope are such that the description of
21 those documents is such that it prompted them to go back and
22 review the text, and they reviewed the text and concluded that
23 notwithstanding the somewhat amorphous description, it
24 substantively didn't fit the scope of the waiver. The only way
25 I know to resolve that is to look at the documents.

1 MR. ROBERTSON: There's nothing amorphous about
2 discussing RQC source code and things like that.

3 THE COURT: I understand.

4 MR. ROBERTSON: And, Your Honor, there's no reason to
5 have some arbitrary cutoff as of the time, you know, that
6 Gibson Dunn came on board. It's a subject matter waiver, Your
7 Honor.

8 THE COURT: It is a subject matter waiver, but what's
9 the scope of the waiver is the issue, and here they are
10 defending the case now. They're not involved in the
11 development of it, and development includes its design, of
12 course, but they -- for the RQC issue, but they pick up the
13 defense of the case, and so now they're defending the case.

14 Let's suppose that Mr. Thomasch is getting ready for
15 trial and talking to Mr. -- what is it? -- Dooner.

16 MR. ROBERTSON: Yes, sir.

17 THE COURT: Mr. Dooner, let's take him. Is it your
18 view that because they discuss the topic of the design and
19 development of RQC, that whatever Mr. Dooner says to Mr.
20 Thomasch is the subject of the waiver?

21 MR. ROBERTSON: Well --

22 THE COURT: You can't take that view, can you? I
23 didn't intend that.

24 MR. ROBERTSON: Let me ask a hypothetical in response
25 to your hypothetical, and that is --

1 THE COURT: I get to ask them. As long as I don't
2 have to answer it.

3 MR. ROBERTSON: I want to answer your question by
4 posing, what if, for example, Mr. Christopherson or Mr. Dooner
5 or Mr. Hagar, who testified for purposes of the injunction and
6 told you a horror story about how people would be dying on
7 operating room tables because there were 277 health care
8 facilities that had 2,000 hospitals that depended on them, and
9 if he made that up from whole cloth, and Mr. Hagar comes back
10 here and they have to represent him and they have to ask
11 questions to Mr. Dooner, to Christopherson, to Mr. Hagar about,
12 you know, we're preparing you and they know that there are
13 going to be false statements made or they know --

14 THE COURT: They know what to do in that case. They
15 know that they have to resign or something else. There's a
16 different rule that applies there. The question is does the
17 subject matter -- that's different.

18 You're talking about a lawyer knowingly putting on
19 perjured testimony, and I don't have any reason to believe that
20 Mr. Thomasch is going to be engaged in that kind of activity
21 any more than I do that you are.

22 MR. ROBERTSON: My point is, sir, that there have
23 been communications that we've actually received after
24 September, whatever cutoff date they want, in which there are
25 lawyers advising Lawson with respect to these issues, and I

1 believe those will be relevant to showing that RQC is a sham.
2 Communications back and forth. Now, I don't know if it
3 continues --

4 THE COURT: Let's say Mr. Thomasch in the court says,
5 look, I'm going to tell you this is a sham, in my opinion it's
6 a sham, and he tells that to somebody in the course of
7 preparing them in a deposition. Are you saying that's covered
8 within the waiver?

9 MR. ROBERTSON: I think again then Mr. Thomasch --

10 THE COURT: It's a different issue.

11 MR. ROBERTSON: Gibson Dunn would have to resign,
12 because I don't know how they can defend a product before this
13 Court that they know has no colorable difference.

14 THE COURT: They can't. Rule 11 forecloses them from
15 doing that, and so do other things, but those rules have
16 meaning, and they apply at different times. We're talking
17 about a rule now of waiver of the privilege and when does that
18 apply.

19 MR. ROBERTSON: I would -- I understand Your
20 Honor's --

21 THE COURT: How far do you want to go, in other
22 words, I guess --

23 MR. ROBERTSON: I would suggest that it would go up
24 until Your Honor's February 21, 2011, order, and here's why:
25 The waiver occurred on Gibson Dunn's watch, and they were the

1 ones who put the witnesses -- or defended the witnesses, and
2 there were statements made with respect -- and were revealed
3 and came out when Your Honor determined a waiver had occurred.

4 And so with respect to those communications up to
5 that date, I think they're fair game, because that -- even if
6 they were done in the course of the depositions or in
7 preparation for deposition, because that applied, and that was
8 the subject matter waiver that Your Honor made based on the
9 evidence presented and documents produced during that period of
10 time.

11 So that would be my suggestion, Your Honor. I would
12 prefer, although I know it would be an enormous burden, that if
13 Your Honor feels the need to review the documents or have
14 someone review the documents, that it be Your Honor and not a
15 special master who will need to get up to speed on this, and so
16 I regret that that would impose a burden on the Court.

17 I am aware, although I have not read it recently, of
18 your decision in the *Brainware* case this past summer, and I
19 thought you had a process for reviewing a sampling of
20 documents. I think it was a hundred documents in the case.

21 THE COURT: That's because it shows what to do.

22 MR. ROBERTSON: And the outcome was that you
23 determined that there was a waiver.

24 THE COURT: They ended up narrowing it down to
25 determine that it was a hundred documents that were at issue by

1 virtue of negotiation. So they tendered the 100 documents that
2 both of them agreed on.

3 MR. ROBERTSON: Well, Your Honor, I'd be happy to
4 review the remaining 4,280 documents myself and tell you which
5 ones I think constitute relevant waiver.

6 THE COURT: That's not what actually happened.

7 MR. ROBERTSON: I don't know how they agreed, Your
8 Honor, because --

9 THE COURT: They agreed to withdraw the request --
10 the plaintiffs agreed to withdraw the request as to a hundred,
11 and the defendant said, these hundred are the ones that we are
12 continuing to believe represent the claim of privilege, and
13 thereupon I had a predicate to make a decision about how to
14 proceed. That was done essentially by agreement. The opinion
15 may not reflect that. I don't know. I don't remember.

16 MR. ROBERTSON: I'll go back and look at it, Your
17 Honor, but I guess my point is, you know, I don't have the
18 documents in my possession, so I can't make that determination.

19 THE COURT: Do you want me to -- do you know how much
20 time it's going to take to review 4,000 documents? Do you want
21 me -- or have somebody undertake it and do that, and then we'll
22 get the decision on the contempt about a year after the Federal
23 Circuit's decided whether the verdict stands or not. Maybe
24 that will move the whole thing.

25 MR. ROBERTSON: Your Honor, can I reflect on that and

1 discuss it with my client, because I obviously want to move
2 this forward, and I don't want to put that burden on the Court.

3 THE COURT: I get paid so well to do that, so don't
4 worry about it.

5 MR. ROBERTSON: Your Honor, I was going to move on to
6 the text grouping.

7 MR. THOMASCH: Your Honor, may I address one factual
8 point to correct a factual misstatement before we leave this
9 topic?

10 THE COURT: Sure.

11 MR. THOMASCH: Mr. Robertson said that by definition,
12 the documents on our log are responsive and relevant, they were
13 reviewed and then produced, and he knows, if he thinks -- maybe
14 he's just forgotten, but he knows that's wrong.

15 The fact of the matter was, we weren't involved in
16 the document production. We came in as that was all going on.
17 Your Honor had ruled on September 15th, before we were in the
18 case, that they were to get whatever discovery they wanted and
19 we were not to object, and then --

20 THE COURT: I don't think it was quite that precise.

21 MR. THOMASCH: That is the way we understood the
22 transcript after reading the transcript. And it reminded me of
23 the George Allen line, because I grew up in Washington, when
24 they said, I gave them an unlimited budget and he exceeded it.
25 But when given carte blanche, they went to the cleaners and put

1 in broad-ranging document requests, but the key was that there
2 was an agreement reached, and I assume it was mutual, but it
3 was somehow between Merchant & Gould and Goodwin Procter that
4 this would be done by having every document optically imaged so
5 it could be computer read and then using search terms, so that
6 if a document's term, the word injunction or any variant on
7 injunction or design or any of these words showed up in the
8 document, then it was automatically produced.

9 No lawyer read the documents before they were
10 produced. No one made a decision that they were responsive to
11 a document request. They were a match to a word on a computer
12 search. That was the only way that that -- I'm sorry, two
13 million pages of documents were produced, frankly, as fast as
14 computers could print them.

15 Attorneys weren't involved in that process at all
16 unlike anything I've been involved in. They weren't being
17 produced in response to request number three or four. They
18 were being produced because the word was in the document that
19 was on the agreed term of -- group of search terms that was
20 devised by Goodwin Procter.

21 So there was no decision about responsiveness or
22 relevance whatsoever, and the documents were put on the
23 privileged log not because anyone made a decision about
24 anything. They were what he calls the first log which was not
25 a privilege log. It was a list -- Magistrate Dohnal had this,

1 a list of potentially privileged documents based on an attorney
2 being involved in the document's creation or recipient of the
3 document or the attorney's name being in the document, and that
4 led to a list that was then reviewed and ultimately brought
5 down.

6 We're creating history to try to make somebody look
7 bad that just isn't the issue here. There are a large number
8 of documents. There's a privilege log, and we will try to
9 follow the rules. I do think that the attorney work product
10 privilege for documents that have -- that don't relate to the
11 time frame during which Your Honor's opinion addressed the
12 waiver and said that during the development stage, and it's
13 very clear, page 22, that you're now talking about that time
14 period before it came to market, that during that time frame
15 you said, the attorneys have not shown that they were working
16 as attorneys, they were working involving in the design of the
17 product, and we respected that waiver of the attorney work
18 product, but subsequent to that time, the work product doctrine
19 applies on a document-by-document basis, Your Honor. Thank
20 you.

21 MR. ROBERTSON: Just briefly in response to that,
22 Your Honor, I don't want to get a he-said-she-said, but Lawson
23 granted itself four extensions on the document production, and
24 we finally had to go to Judge Dohnal after a month and a half,
25 and he entered an order giving them an additional extension to

1 provide documents.

2 Now, they chose to do word searches. Lawson
3 contacted us and said, tell us the keywords you want to search
4 for, and we gave them some. They gave us back another list.
5 We said, these are over inclusive. You're going to be
6 producing way too many documents, and you haven't limited it to
7 the time frame we suggested which is starting the date after
8 the trial, because that's when it's going to be relevant to
9 whether there was a design-around or not, and that's where the
10 document requests were focused on.

11 As to this issue about when the cutoff should be,
12 I've suggested to Your Honor that it should be at least as of
13 the date of your order, but the fact is, it is a subject matter
14 waiver, and if there was involvement with attorneys after the
15 fact that reveal that this, indeed, was a fraud or sham, that
16 should be open to the subject matter waiver because we are on a
17 search for truth, and we need to know, and Your Honor was
18 exactly right when it said, if you're saying that this is
19 design, either the public or the Court -- and it's new, and
20 you're going to see when you look at that Christopherson
21 document, they're saying, we have to say it's new even if it's
22 not new.

23 If you're saying that to the public or the Court,
24 that will inform the Court as to whether or not there were
25 colorable differences involved in here or not, and if the

1 lawyers involved, whether in-house or outside counsel, that
2 should be subject to Your Honor's order.

3 With that, if I could move on, I think these next two
4 issues are going to be fairly black and white, and, you know,
5 it's rare a lawyer ever says that, but there are issues here
6 with respect to Your Honor's ruling on whether or not a
7 document that is merely cc-ed to an attorney is covered by a
8 privilege, and I was surprised, because I thought Your Honor
9 made that crystal clear both in the order and as well in a
10 September 14th conference.

11 THE COURT: How many documents are in this category?

12 MR. ROBERTSON: 23, Your Honor. Your Honor, it's --
13 I'm sorry, sir. It's slide 14 in our PowerPoint.

14 THE COURT: 30 examples or the PowerPoint that has
15 Goodwin Procter at the top? Which page?

16 MR. ROBERTSON: 14. There's two categories here,
17 Your Honor. Maybe I should group them together. There are
18 documents that are missing an author or recipient which Your
19 Honor's order made clear needed to be produced. So there are
20 226 of those documents, and then there are documents between
21 non-attorneys reflecting legal advice.

22 I'm sorry, Your Honor. So the ones that just are
23 between non-attorneys reflecting legal advice is what I'm
24 talking about where a lawyer was merely cc-ed, and Your Honor
25 made clear that could not be protected by the attorney-client

1 privilege.

2 Now, and the other ones are where Your Honor made
3 clear the privilege log was defective because it was missing
4 either an author or recipient. The argument is made that,
5 well, some of these documents don't have authors or recipients,
6 but they certainly have what's called metadata, Your Honor,
7 that reveals, for example, who the author would be, that sort
8 of data that backs up the document, that shows who created the
9 document, how many versions there are, who might have modified
10 the document.

11 That could have been entered, but Your Honor's order
12 was clear. If the log didn't have an author or recipient, or
13 if it just merely had a cc of an attorney, that wouldn't be
14 covered, and they had to produce them.

15 Now, at the September 14th conference, you raised
16 that point, and Mr. Thomasch responded by saying, "I did not
17 understand the ruling that way, but we will adopt, obviously,
18 your position." Well, they haven't adopted your position, and,
19 in fact, they continue in their opposition to this motion to
20 argue that the Court was wrong when it indicated that documents
21 merely cc-ed to lawyers are not covered by the attorney-client
22 privilege.

23 Now, that's just merely a motion for reconsideration
24 that Your Honor has affirmed twice, and we think that's not
25 appropriate. So that's -- you know, we think this is

1 clear-cut, it's black and white, and those documents can be
2 produced forthwith and should be.

3 I have one last argument with respect to attachments
4 that have not been produced or even married up to cover emails.
5 For example, there are emails that will indicate that there's
6 an attachment, and we will receive the email but not the
7 attachment, and I have a few poster children, if you will, Your
8 Honor, for that I can address after Mr. Thomasch addresses, or
9 whoever it's going to be, addresses this issue about cc-ed
10 documents and documents containing no author or recipient.
11 Thank you.

12 MR. THOMASCH: I actually agree with Mr. Robertson on
13 one point. These issues are actually fairly straightforward.
14 There are two categories we're discussing at the moment, and
15 I'll break then down separately. One is what Mr. Robertson is
16 calling the attorney cc documents. The other is the no author
17 or recipient documents meaning that in the to and from fields,
18 and limiting the recipient to from and not cc, in the to and
19 from fields there are not attorneys. So in those two things.

20 Let's look at what he's calling the attorney cc-ed
21 documents. I did hear Your Honor's ruling on September 14, and
22 we went back through all of them, and we produced multiple
23 documents. We are left with 24 documents. We are not asking
24 for a motion for reconsideration.

25 I may be asking for a motion for guidance or a

1 specific order to produce them. I have them on a CD. I can
2 give Your Honor the documents in hard copy or on CD, if you
3 wish them, to review *in camera*, but when Your Honor made the
4 ruling about attorney cc's, there was -- this issue, I don't
5 think, came up about these are documents where it's -- the log
6 entry and the document clearly reflect that the cc-ed
7 attorney's legal advice is in the document.

8 And so if an attorney were to give advice to the head
9 of the department, and the head of the department then gives an
10 instruction to one of the people that work for her and say that
11 the attorney has advised me of X, our legal department says Y,
12 and passes that on so the person can do her work in conformity
13 with the legal instruction that a company should be providing
14 to their employees, we believe that that is fairly privileged,
15 and we think that that's -- that that is covered by the
16 privilege and hasn't been, in any sense, waived.

17 But the document does not actually -- it wasn't
18 authored by an attorney, and it wasn't received by an attorney.
19 The attorney is a recipient of the document. Instead of it
20 being to them, they are cc-ed, but I've never taken the
21 position in my career you can take an unprivileged document and
22 somehow make it privileged by attaching it to some cover email
23 and sending it off.

24 That's not what this is about. This isn't about just
25 two people talking to each other. This is where two employees

1 of the company are communicating, the substance of the legal
2 advice appears in their communication, and the person who gave
3 the advice is a cc to the document.

4 Now, if that's unprivileged, we can produce these
5 documents as soon as they're processed, but they've been
6 segregated, they're there. I can produce hard copies of the
7 documents today and give them to Your Honor for review. I
8 don't want to reargue and move for reconsideration, but I do
9 want to make sure we understand the rules and we don't over
10 produce, and that's what -- it's two dozen documents out of
11 that 9,700, and they're not important because of their
12 substance.

13 It's the principle at point that we don't think that
14 the question of privilege depends solely on whether the
15 recipient is a cc versus a person in the to column, but that's
16 all there is to say on that point.

17 On the other point, where it's no author or recipient
18 on the log, Your Honor identified logging deficiencies, and so
19 logging deficiencies included where there was no author or
20 recipient on the log. You know, I note that, again, because
21 this is not outrageous conduct, this is not intentionally,
22 flagrantly violating court orders or anything else, the log
23 that was produced to us in response -- in connection with about
24 a 500-page document production by ePlus has many, many entries
25 that have no author or recipient identified. That's in the

1 nature of the business when you separately log cover memos and
2 attachments, and the attachment often is a document that
3 doesn't have an author or recipient.

4 If it's -- an easy example would be supplemental
5 interrogatory number five. You'll recall when we first started
6 out in the case, we were doing two things. We were trying to
7 produce documents, and we were trying to identify in an
8 interrogatory a narrative of what changes were made, just what
9 are the changes that are at issue, that's it, and we had
10 thought originally that that was okay. We gave them source
11 code and a file that showed them every change of the source
12 code, and then they wanted a narrative, so we did that.

13 If I were to send draft interrogatories back and
14 forth with a client, say, here's a draft of supplemental
15 interrogatory number five, would you review it and provide me
16 with any additional comments that you might have, please
17 confirm that these are the three changes that we want to
18 discuss -- that's a hypothetical, but let's just say that went
19 on. I would consider that to be privileged, and my draft
20 interrogatory response that showed where my thinking was at
21 that time as I worked back and forth with my client to develop
22 the document to serve, I would say that draft is a privileged
23 document, it's attorney work product, and it's an
24 attorney/client communication, but the draft interrogatory
25 doesn't have an author or recipient.

1 THE COURT: Of course, it does. Whoever wrote it.
2 Every document has an author or recipient. It doesn't have an
3 author or recipient stated on it, but every document has an
4 author of some kind if it's a prepared document, doesn't it?

5 MR. THOMASCH: I guess you --

6 THE COURT: I have a lot of documents in my file that
7 reflect letters -- they're not in my file, they're in my
8 drawer -- that I've written, and I have putative recipients,
9 but I never sent them.

10 MR. THOMASCH: But a document like an interrogatory
11 response --

12 THE COURT: I thought better of it.

13 MR. THOMASCH: It may be a collection of comments
14 from lots of people.

15 THE COURT: The point is, there is an author to every
16 one of your documents, isn't there?

17 MR. THOMASCH: In that sense, yes, there is, but as a
18 logging deficiency matter, in the realities of modern
19 electronic discovery, the way that logs get created in the
20 first instance is generated by a computer, and there is no
21 author or recipient that is recognized on the document. The
22 document doesn't reflect such. There's no way.

23 It doesn't reflect it in any data, so in that
24 situation where these are attachments and drafts and things of
25 that nature where we believe that the document is independently

1 privileged --

2 THE COURT: Okay, let's take this: I write a memo.
3 I'm a lawyer.

4 MR. THOMASCH: Yes.

5 THE COURT: I send it to you. It's to Mr. Thomasch
6 from Mr. Payne.

7 MR. THOMASCH: Right.

8 THE COURT: Are you taking the view that the document
9 that I write that doesn't have my name on it anywhere is not
10 authored by me and that you don't have to --

11 MR. THOMASCH: That would be authored by you. That
12 would be authored by you.

13 THE COURT: If you have a logging deficiency that
14 relates to the integrated document, then the integrated
15 document is one. Just because your computer has separated it
16 artificially doesn't change it in any way, the fact that
17 there's a logging deficiency as to it, does it?

18 MR. THOMASCH: I don't think it's a logging
19 deficiency -- if you send me a letter, then you are the author,
20 and we will have the author on the log.

21 THE COURT: That's not what I'm talking about.
22 There's a memo, cover memo, Mr. Thomasch, here's my draft,
23 period. That's all it says. And attached to it -- in the old
24 days, it would be stapled or paper-clipped.

25 MR. THOMASCH: Yes.

1 THE COURT: And, in fact, I think some of the
2 computer features actually refer to it as an attachment, don't
3 they?

4 MR. THOMASCH: Right.

5 THE COURT: Most of them do. So that's today's
6 equivalent of paper. If that document authored by me -- and it
7 doesn't have my author on it -- my name on it, that's a logging
8 deficiency as to the whole entity that is the document, isn't
9 it?

10 MR. THOMASCH: I honestly don't think so.

11 THE COURT: Why?

12 MR. THOMASCH: Because I've never heard that in the
13 midst of producing millions of documents we have to go out and
14 do investigations. There's no requirement that people --
15 usually when someone sends you a document, your name is on the
16 document. But if someone has a document in their file and it's
17 a draft plan of X, they have a draft plan about the rollout, it
18 may have been collectively authored by 30 people, but the
19 document itself doesn't reflect an author.

20 Now, if I say -- if I'm a lawyer and I say I have
21 marked this up because I think there's things here that we have
22 to change, and we have to do X, Y, and Z, and I provide legal
23 advice on that draft brochure, I would say that -- if the
24 comments are on the brochure on a separate piece of paper, and
25 I author that, I'm the author, and whoever I send it to is the

1 recipient, but the brochure that I'm attaching -- yes, someone
2 created it, but it's not a logging deficiency --

3 THE COURT: It isn't a matter of someone creating it.
4 I created it.

5 MR. THOMASCH: I didn't create that document.
6 Someone sends me a draft --

7 THE COURT: You must be talking about something
8 different --

9 MR. THOMASCH: Let me try it --

10 THE COURT REPORTER: Mr. Thomasch, one at a time,
11 please.

12 THE COURT: She's kind enough not to remind me. I'll
13 get mine later.

14 MR. THOMASCH: It was I that spoke over you. If
15 someone -- and I'm a lawyer and my client sends me a draft
16 brochure and says, this is the brochure that we've been
17 developing and we'd like to send this out to people to explain
18 this subject, but would you give us your legal input, and I
19 review it and then I write back and say, I think you need to
20 make changes at pages five, seven, and nine, okay, and I send
21 it back to them, and now in their files is the original
22 brochure and my letter back to them about making changes to
23 pages five, seven, and nine. It seems to me that the document
24 is not going to have an author, the underlying document. As
25 the lawyer, I didn't create the brochure. I commented on the

1 draft brochure.

2 THE COURT: The document has an author. The document
3 has an author that came originally with it. The problem is --
4 remember what we're dealing with. There's a rule that says
5 what you are supposed to do in creating a privilege log. There
6 was an order in this case about what you were supposed to do,
7 and it was clear as a bell what you were supposed to do about
8 author and recipients, and there's a reason for both the rule
9 and the order, and that is so that the other entity that's
10 going to get this log can make a challenge to it, and it's
11 supposed to have enough information on it that's sufficient to
12 allow them to do it.

13 A deficiency in the log is what happened here. That
14 may seem technical, but it's not technical in this case because
15 it was an effort -- the order and application of the rule were
16 an effort to get this done quickly and to get this thing
17 straightened out, this mess straightened out that was this
18 document production, and it was a simple matter, and the fact
19 is that somehow somebody didn't do the log right, and that was
20 held to be a waiver of the privilege because the log, after
21 specific instruction, wasn't done right.

22 If your contention is there's this cover memo that
23 says from Payne to Thomasch, and Payne sends the documents,
24 says, here's the draft, and, in fact, there's no Payne listed
25 on the attachment, but you link those documents together,

1 they're one document, and the waiver applies to those, to both
2 of them, because they are one document.

3 MR. THOMASCH: I do understand. I do understand your
4 example now, and I understand that. When the document came to
5 me from you -- the document I received, you're the recipient of
6 both. You were the author of both. If you send me the cover
7 memo and send me the brochure, when I receive it, I say, both
8 of them came from you.

9 THE COURT: Here's the memo.

10 MR. THOMASCH: I got it, but what I'm saying is, now
11 that document goes in files, and it may be that I only have in
12 the file the attachment. I don't know what the facts are, but
13 years later or months later we have a document production, and
14 when the document gets swept up in the production, the
15 underlying document doesn't show any author or recipient
16 because no one signed or entered that information at the time
17 of its creation which was pre-litigation, pre-document request,
18 everything else.

19 Now, when it comes time to make the log, the only way
20 I could do that is if I went out and did a factual
21 investigation --

22 THE COURT: That is precisely what you do. There's
23 no difference between the way documents are to be reviewed
24 today and the way they were reviewed 20 years ago. You have a
25 computer that allows you to do it more expeditiously, but

1 that's not the answer, to rely just on the computer. The
2 answer is to use the computer as a tool to set it up, but once
3 you get the situation that you have -- if I were back in the
4 old days looking at the piece of paper, I would look at Joe
5 Smith's file, and would I say, there's the memo, there's the
6 attachment, and they belong together because I can read the
7 attachment, the attachment that says here's the attachment, it
8 is X for example, and it's there, and I have to produce it, and
9 then you have a way of ascertaining -- everything else that
10 matches that particular document that was lost from the
11 original cover memo, and every copy of it has to be produced,
12 and that hasn't changed just because the computer does things a
13 somewhat different way I don't think.

14 The answer to the question is, yes, there's more to
15 do than to rely on the computer.

16 MR. THOMASCH: I understand, and I don't believe that
17 in this case there would have been time to do that which is now
18 apparently required. The fact of the matter is the --

19 THE COURT: It's not that which is now
20 apparently required. It is that which has always been
21 required.

22 MR. THOMASCH: I understood. I do think Rule 502 of
23 the Rules of Civil Procedure, the new Rule 502, I think,
24 recognizes that the drafters of the Federal Rules of Civil
25 Procedure see a marked difference in the manner in which

1 documents are produced and the extent to which privilege can be
2 waived and should not be deemed to be waived --

3 THE COURT: You are talking about the pending draft.
4 You're talking about the old rule, the extant rule. There are
5 pending drafts of these rules.

6 MR. THOMASCH: Yes.

7 THE COURT: When you say the draft of 502, are you
8 talking about that one?

9 MR. THOMASCH: Yes.

10 THE COURT: It doesn't apply.

11 MR. THOMASCH: The existing Rule 502.

12 THE COURT: Are you talking about the commentary to
13 the existing rule or what? I want to know what you're talking
14 about so I can find it.

15 MR. THOMASCH: I can hand up Rule 502. May I
16 approach the clerk?

17 THE COURT: I have 502. I just want to know what
18 you're talking about. I wasn't sure what you were talking
19 about.

20 MR. THOMASCH: I'm talking about --

21 THE COURT: What part of it are you talking about?

22 MR. THOMASCH: Specifically in the rule, I think the
23 rule has been changed quite substantially from its predecessor
24 to allow for party agreements on the effective disclosure in a
25 federal procedure, in a federal --

1 THE COURT: Yes, it has. Is there such an agreement?
2 If there's an agreement, I apply the agreement, but there isn't
3 an agreement -- nobody has brought to my attention the
4 existence of an agreement on this topic.

5 MR. THOMASCH: We have a discovery order that was the
6 subject of discussion among the --

7 THE COURT: It may have been, but did anybody put
8 this in any of your briefs?

9 MR. ROBERTSON: No, Your Honor, it wasn't briefed
10 because there is no agreement. There was an agreement that
11 inadvertent disclosure -- in fact, Your Honor did address that
12 in your memorandum opinion. Inadvertent disclosure, if it
13 occurred, is not clawed back after ten days. Your Honor made a
14 ruling with respect to --

15 THE COURT: I understand that, but that's not what
16 I'm talking about. He's apparently taking about something
17 other than inadvertent disclosure. You are talking about an
18 agreement respecting the way documents are produced, and I
19 don't see that.

20 MR. THOMASCH: No, I'm sorry. I was talking about
21 the fact that inadvertent disclosures of electronic documents,
22 the rule was changed, in my mind, to be far more forgiving than
23 the prior rule with respect to hard copy documents on how one
24 deals with inadvertent disclosure of documents --

25 THE COURT: I agree with that in part, but we don't

1 have inadvertent disclosure here. That's not what we're
2 dealing with here. You're using that as an analogy to say
3 times have changed, and you better recognize it, old boy.

4 MR. THOMASCH: Not the last sentence, but I was using
5 it as an analogy to suggest that the world of electronic
6 discovery is different and that if a document, on its face,
7 doesn't show an author or recipient, I think that there is a
8 good-faith reason to believe that it is not a deficiency in the
9 log, and I note, as I say, the other log that we received has
10 exactly that same problem, and those documents haven't been
11 produced.

12 THE COURT: But we haven't -- that's not before me.

13 MR. THOMASCH: You are correct, Your Honor. You are
14 100 percent correct. At any rate, those two issues are quite
15 discrete. That's all there is to it, and we have in both
16 instances -- and it may not matter to Your Honor. In both
17 instances, we have the documents segregated and available for
18 Your Honor's review, and in either instance, frankly, I just
19 would like to make sure that there's no question later when the
20 issue is dealt with about whether the district court intended
21 the order to go this far.

22 If Your Honor intends it to go this far, then we have
23 the documents, we can produce them in native form, you know,
24 this afternoon or tomorrow morning. We can produce them in
25 three days in processed form. It's not a dispute. It's really

1 an asking for guidance.

2 THE COURT: Processed form means hard copies?

3 MR. THOMASCH: It's more than that. It means
4 electronic copy with Bates number and OCR, optical character
5 recognition. This came up at the November 8th conference, and
6 Mr. Robertson asked for all the documents to be produced in OCR
7 form, and we said, that will take time, but we will agree.

8 He did not want them in native form which is just a
9 copy of the document, and we've agreed, and we pay an expense,
10 and we have the staff to do it, but we image all the documents
11 and we give them with Bates number and optical character
12 recognition so that they can be searched. That's the
13 processing steps which takes about two to three days, and we
14 can have hard copies which are in native form.

15 THE COURT: How do I identify what I'm reading in an
16 order if I don't have it in processed form?

17 MR. THOMASCH: Either way, either native form or
18 processed form, you have the document. The only question is,
19 one of them is just a collection of pages, and you can't search
20 for them. You can't ask the computer to give me all documents
21 that have the word Dooner in them.

22 THE COURT: I'm not going to do that.

23 MR. THOMASCH: He would like to.

24 THE COURT: That's fine.

25 MR. THOMASCH: He could do it himself, but Your Honor

1 asked me --

2 THE COURT: Excuse me. When you say produced, you
3 were talking about produced to him if you are told to do it.

4 MR. THOMASCH: Right.

5 THE COURT: I see.

6 MR. THOMASCH: In other words, I have a keen sense
7 that I'm losing this argument.

8 THE COURT: I don't know that you are. I'm trying to
9 sort out the issues. I ask a lot of questions to find out
10 answers because I know that I don't have all the answers, and
11 as much as I try to keep up with what happens in the world of
12 electronic discovery, I find every day there are things going
13 on that I don't know about.

14 I think it's important for judges to know about that,
15 because that's what's happening in the world over which I'm
16 presiding. So I ask a lot of questions that probably may seem
17 wrongheaded to you.

18 MR. THOMASCH: Not in the least, Your Honor. There's
19 been the discussion -- the use of the word forthwith or
20 immediately has come up on multiple occasions, and we have
21 received scathing attacks because we didn't do something on the
22 day it was ordered to be done.

23 THE COURT: Do you know how often I read all those
24 love notes that you all send to each other? I have so many
25 more things to do than to read this kind of stuff. I don't

1 like it to begin with. I don't read it unless I actually have
2 to, and once I read it, I try to get it out of my mind because
3 I really try to decide the issues on the issues, not on
4 pejorative or ad hominem statements. I don't think that helps
5 advance the ball for either one of you.

6 MR. THOMASCH: I agree, and as the recipient of them,
7 I was trying to prevent it from happening by making clear if we
8 have to produce them and we need to process them, it takes 48
9 to 72 hours do so. We can produce hard copy within 24 hours
10 without problems. We have them set aside, they're ready, and
11 Your Honor could review them if he wished.

12 THE COURT: What would I be reviewing is how --

13 MR. THOMASCH: You would review one of two things.
14 You could review either on your computer screen -- you would
15 just pull it up, and it would show you the log entry of the
16 document and the documents, or I can copy them, and you can
17 review old-fashioned documents.

18 In either case, one is, I think, 24 documents in the
19 attorney category, and I believe there are roughly 250
20 documents in the no-author or recipient category.

21 THE COURT: They say 226.

22 MR. THOMASCH: We say 224, they say 226.

23 THE COURT: You all are in the ball bark.

24 MR. THOMASCH: We're in the ball park. We do have
25 them, they're ready.

1 THE COURT: Thank you.

2 MR. ROBERTSON: Just briefly on that, Your Honor,
3 one, I would respectfully suggest that no review is necessary
4 here. This whole issue is fully briefed. Your Honor had all
5 the arguments in front of him. Your Honor is exactly right
6 what the Federal Rules of Civil Procedure require.

7 They didn't comply, and so why review something? You
8 ruled on this on February 21, and you said, "The following
9 privilege log entries are inadequate: Entries that do not
10 contain an author or recipient." So that was just a motion for
11 reconsideration, respectfully, Your Honor, and all Your
12 Honor needs to do --

13 THE COURT: Made a motion for clarification, what
14 does it mean in the case of a document where there's a cover
15 memo and the document to which it's attached doesn't reflect an
16 author or a recipient, and those kind of things happen.

17 MR. ROBERTSON: Let me just address that, then. Mr.
18 Thomasch represented to you the production they made was an
19 entire electronic production; in other words, all these
20 documents were on computers. On every computer, even Your
21 Honor's computer, your law clerk's computer --

22 THE COURT: Even as old-fashioned as our computers
23 are?

24 MR. ROBERTSON: Even that old-fashioned computer you
25 have, Your Honor.

1 THE COURT: You don't know how old-fashioned. I
2 don't know if I can even read your disks.

3 MR. ROBERTSON: I guarantee, Your Honor, whatever age
4 that computer is, it has that metadata that shows who the
5 author is, the date it was created, the time it was created.

6 THE COURT: I know, and you know what -- Mr. Thomasch
7 says in his papers that they were trying to do that until you
8 all fired off your motion here, and you made them mad.

9 MR. ROBERTSON: That's not accurate, Your Honor,
10 because --

11 THE COURT: What; didn't make him mad?

12 MR. ROBERTSON: Well, I try not to make Mr. Thomasch
13 mad.

14 THE COURT: I don't think you try real hard.

15 MR. ROBERTSON: My point is, Your Honor, that it
16 easily could have been done. It could have been after your
17 February 21 order, but they never changed it, because at the
18 time of your order, that information wasn't there, and that's
19 not what Mr. Thomasch has been complaining about.

20 THE COURT: What information wasn't there?

21 MR. ROBERTSON: The information --

22 THE COURT: That information --

23 MR. ROBERTSON: The author and recipient on the
24 privilege log was not there. So that's never been changed,
25 never been modified, and there's never been representation that

1 they were going to fix that after the fact. We came in to
2 simply enforce the Court's order that they were in violation of
3 for not producing documents that did not have an author or
4 recipient. That's the posture of the case now, not go back and
5 fix it.

6 Let me make another point about that, Your Honor.
7 The reason they should have made that inquiry, as Your Honor
8 has suggested, is because to put it on a privilege log, they
9 would have had to determine that it was privileged, and that
10 would require knowing was it authored by an attorney and was it
11 received by a client.

12 THE COURT: That's why the author and recipient are
13 important. It's not just the prurient interest of finding out
14 who the author or recipient is. It is that somebody --
15 privilege exists. It has a definition. It says, it is
16 communication to a lawyer for the purpose of seeking legal
17 advice or from a lawyer communicating legal advice, and the
18 purpose of the rules and the purpose of the order that was
19 issued here is to structure a log that is sufficient to allow
20 those judgments to be made so that we don't have to do what
21 we're doing here.

22 Now, what's happened here is, look, they were moving
23 fast, they made some mistakes, they did something maybe wrong,
24 and in addition to that, there was an interpretive difference,
25 and you all have got to find some way to sort these things out

1 without fighting over all of them.

2 I'm going to have to resolve them, but there's
3 something much more important here to both of your clients, and
4 that's what happened in this process, and I want to get to that
5 just as soon as I can. So I think I understand what the deal
6 is.

7 MR. ROBERTSON: To be fair, Your Honor --

8 THE COURT: You all probably didn't do everything
9 perfect, either.

10 MR. ROBERTSON: That's probably absolutely true, but
11 to be fair, there were four iterations of this, and then we had
12 to go to the magistrate judge and then we had to come to you,
13 and so they had four opportunities to fix that problem. They
14 didn't do it. That's what Your Honor cited in your memorandum
15 opinion. So this isn't a situation where now they should get a
16 fifth bite at the apple, Your Honor, based on the ruling before
17 you, and, respectfully, I think that was a motion for
18 reconsideration or clarification, but I think your order --

19 THE COURT: Why don't you go a little faster and see
20 if you can really get Ms. Peterson to get down on me.

21 MR. ROBERTSON: I'm slowing down, Your Honor. So I
22 come to the last category.

23 THE COURT: How long is the last category going to
24 take?

25 MR. ROBERTSON: If Your Honor is suggesting a lunch

1 break, I think Ms. Peterson would probably appreciate that as
2 well.

3 THE COURT: I think everybody would probably benefit
4 from a little bit of time away. We'll come back in an hour.

5

6 (Luncheon recess.)

7

8 THE COURT: All right, attachments is the next issue;
9 is that right?

10 MR. ROBERTSON: Yes, sir.

11 THE COURT: Okay.

12 MR. ROBERTSON: And it concerns an issue we're having
13 with regard to the failure to provide us with attachments to
14 documents that either have been provided or indicate that there
15 would be attachments, and before I do that, the attachment
16 issue is also relevant to this issue we were talking about
17 where there were documents on the privilege log that contained
18 no author or recipient, because when we had that during our
19 meet-and-confer, we provided Lawson's counsel with a list of a
20 number of those documents and said, you know, we need to know
21 what these are because we can't determine what they are.

22 The response we got back on many of them were, we're
23 not producing them because they're attachments. I don't know
24 of any reason why the mere fact that it's an attachment to some
25 other document they wouldn't need to produce it, but it begs

1 the question, Your Honor, of course, which is the whole reason
2 that the author and recipient information is critical is
3 because we would need to determine why an attachment that they
4 must have ascertained was privileged based on the fact that it
5 was attached to something, and that's why it made its way onto
6 the privilege log.

7 So it's those kind of things that I think are
8 exacerbated by the fact they failed to include the author and
9 recipients with a number of attachments. With respect to some
10 of the other documents, and I have examples for you, they have
11 included a cover email to a document that says right on its
12 face, there is an attachment.

13 Now, the cover email really communicates nothing
14 sometimes other than from client to attorney or attorney to
15 client, here is an attachment for you to consider in our
16 analysis of RQC, for example.

17 Let me give you some of the names of attachments,
18 because I find them to be quite interesting. In many
19 instances, we do have the cover email, and I have some examples
20 for you if you want to see them, Your Honor, but some of the

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 This is all at page 13, Your Honor, of our reply
25 brief, and there is a tab two that has a table that contain all

1 of these examples.

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 On other occasions, the contents of the communication

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 I could go on and on and on, Your Honor. There's a
20 number of these, but the point is, as the Federal Rules of
21 Civil Procedure make clear, they need to produce the documents
22 as they're maintained in their ordinary course. I think Your
23 Honor made the point a little earlier talking about another
24 category of documents when you said, when you open up the
25 document and it's the cover memo, and it says attachment, all

1 you need to do is click on it and it should be produced in the
2 ordinary course of business, and it should be produced
3 together.

4 The other problem we're having, Your Honor, is we may
5 have some attachments, although some of the ones I mentioned
6 were clearly -- we do not have them, but they haven't married
7 them up with the document, the cover memo that says, please see
8 the enclosed attachment, and they're refusing to do that for us
9 now. They're saying they can't do it.

10 Now, that's just not right, Your Honor, under the
11 rules. In fact, we cited some case law to Your Honor, several
12 cases in which the courts have ruled that one would expect, and
13 I'm quoting now, that an email and its attachment would have
14 been kept together in the regular course of business. And
15 there's cases cited at page 12 of our brief.

16 And so, Your Honor, there's no reason not to produce
17 attachments so we can find out who received the attachment,
18 what was the purpose, what was said in it, and the content of
19 that.

20 I think it's clear, I think the federal rules compel
21 it, I think there's no reason for them to be playing
22 gamesmanship like this, and if they have them, they don't tell
23 us what they're married to. It's as if they shuffled the deck
24 on us, and we can't figure what's matched up to what, but we do
25 know, Your Honor, on several critical ones, based on the

1 description I just gave you, we don't have that in the
2 production. Thank you.

3 MR. THOMASCH: Your Honor, Mr. Mark is going to speak
4 to this issue if he may.

5 THE COURT: All right.

6 MR. MARK: Afternoon, Your Honor. Richard Mark for
7 Lawson Software.

8 THE COURT: Good afternoon.

9 MR. MARK: The issue of attachments as raised here
10 can be resolved fairly easily. It's between counsel, and let
11 me start with this factual statement: The issue is raised in
12 Exhibit 2 to the ePlus reply brief, and there are 15 documents
13 listed in there. The proposition is that there are related
14 attachments to those documents that are not married up and that
15 they don't have them.

16 Those two statements are not correct. They have
17 every one of the attachments listed in there, and they have
18 been produced in a way that allows the attachments and the
19 documents to be married up using ordinary, as I expect counsel
20 has, e-discovery software that digests that.

21 So I don't think I should spend a lot of time on the
22 issue other than just to outline what has been done so Your
23 Honor understands how the production has occurred that allows
24 this to happen and that we have, in fact, complied with the
25 discovery order, and when documents, you know, principle emails

1 or root documents and their attachments are produced, they can,
2 in fact, be married up.

3 THE COURT: But in the ordinary course of business,
4 they are married up, so that's how they ought to be produced.
5 The fact that you have to use some software to do it is neither
6 here nor there.

7 In other words, what you just told me is the same
8 thing as saying, as I understand it, if I give you documents in
9 a box, you could -- if I give you the index -- figure out what
10 sub files they go in, if I tell you what sub files they would
11 be placed in, and that's not producing them in the ordinary
12 course of business. That's what people did in the old days.

13 In fact, that's why the rule requiring production in
14 the ordinary course of business was done, was precisely to stop
15 this shuffling which people were doing.

16 It sounds to me like what you are saying is it's
17 sufficient that you can produce them in a shuffled form, but
18 because there exists a software that can be applied to them and
19 marry them up, you don't have the obligation to produce them in
20 their -- in the form that they're kept. Am I misunderstanding
21 the argument?

22 MR. MARK: That's not what I intended to say.

23 THE COURT: Okay.

24 MR. MARK: Indeed, to use the card deck analogy is --
25 perhaps I should go back. The way this comes up is, it did, in

1 fact -- it is, in fact, the case that as documents were
2 produced, there were judgments made, and on occasion a judgment
3 would be made that either a -- let's call the principle email a
4 root, r-o-o-t, document. That's the root, and then there's an
5 attachment to it, okay? I'll just use that vocabulary. That
6 one or the other might have been viewed as privileged and the
7 other would be produceable. So there have been instances when
8 one or the other was produced separately.

9 The 15 examples they give you, if that's what that
10 offer was intended to be, what has happened or the case with
11 each of those documents is one of two things: Either there is
12 no attachment to the document at all. That happens in the
13 case, for example, as I'm sure Your Honor is familiar, you'll
14 sometimes receive an email with an attachment, and then there's
15 a reply to that. You might see an attachment was referenced,
16 but that reply email will not send the attachment back.

17 The attachment may, in fact, and in this case, we
18 have identified, was produced as an attachment to the original
19 root email so they could find it that way. That was produced
20 in the ordinary course.

21 Let's go to the second example which would be of
22 concern, and that is where in the initial production you had
23 one produced and the other not. How would you know, how would
24 you figure out that these two are related to each other?
25 Rather than -- what happened, what the software does is better

1 in some ways, we think, than what used to happen with
2 old-fashioned hard copy, because what happens is, numbers are
3 assigned to the documents that allow them actually to be
4 inserted and associated as a family in a relationship with the
5 document they should be attached to. So, in fact, they are put
6 into the exact order in which that ordinary course production
7 would require.

8 THE COURT: Do they have the software? Does your
9 opponent have the software?

10 MR. MARK: We have -- I actually don't know the
11 answer to that question.

12 THE COURT: Wouldn't that solve a lot?

13 MR. MARK: I would be surprised if they do not,
14 because it is fairly standard among law firms, and we have not
15 had this type of complaint earlier than this stage. That's why
16 I say --

17 THE COURT: Earlier than what?

18 MR. MARK: It has come up in the context of this
19 motion.

20 THE COURT: But after the motion was filed, did you
21 call them and say, hey, do you have software X, and if you do,
22 all you have to do is run it and you can solve all these
23 attachment problems and narrow it down, or if you don't, here's
24 where you buy it, or if it's proprietary to you, you could say,
25 we'll let you have it.

1 MR. MARK: It's not proprietary to us. It's off the
2 shelf. As I say, this came up in the reply brief after sort of
3 the meet-and-conference process had been truncated.

4 I do also want to go back, though, and note that in
5 the discovery order in terms of what is required of the parties
6 for production, paragraph --

7 THE COURT: Which order are you talking about?

8 MR. MARK: This is the November 3rd, 2009, joint
9 discovery plan, and it has protocols that are followed for
10 various parts of the case, and one paragraph dealing with the
11 production of documents says, "The OCR," optical character
12 recognition, "of each document and/or extracted text with
13 metadata shall also be exchanged."

14 Mr. Thomasch referred earlier to a November 8th
15 conference last year at which the issue of the format of
16 document production came up, and at page 78, there is reference
17 made by counsel for ePlus to this stipulation and the entry of
18 a court order saying that documents should be produced OCR
19 readable format. That is further discussed by the parties. It
20 is -- Mr. Thomasch explained on the transcript what that
21 processing entails to make it OCR readable, and the expense and
22 the work which he averted to earlier, and then on page 81 and
23 82, as the issue is resolved in terms of who is going to do
24 what, Your Honor says -- makes reference to this again and at
25 the top of page 82 says, "By the 18th," referring to

1 November 18th, "in OCR format will be what you'll do."

2 That is, as I understand it, the way documents had
3 been produced earlier in the case. It is the way we processed
4 and produced them pursuant to the discovery order and was
5 highlighted on November 8th, and it provides the information
6 that, in fact, makes this linkage that is the subject of the
7 complaint.

8 So I understand Your Honor's statement that perhaps
9 this should have provoked discussion among counsel earlier, but
10 I do think that if that is a problem that they are having, the
11 data has been supplied to them that allows this identification
12 of attachments to take place, and if there's an issue, we will
13 resolve it with them.

14 THE COURT: What is the software called?

15 MR. THOMASCH: Concordance® does it, Relativity® does
16 it, but whatever database that they have, I'm -- the reason
17 they want it OCR readable is they are putting it in some sort
18 of computer database that allows them to search through the
19 documents using word searches and whatnot. So they have some
20 kind of software, and these are standard products that law
21 firms have.

22 THE COURT: You all haven't talked about this?

23 MR. MARK: Thank you, Your Honor.

24 MR. ROBERTSON: Your Honor, I'm surprised at that
25 representation because we did raise this with them. We told

1 them we couldn't match up the documents. We told them they
2 needed to either marry them for us by letting us know what they
3 were and produce it.

4 The only way you can use this software that Mr. Mark
5 is talking about is if you have the metadata. We asked them
6 for the metadata. They said, no, you can't have it. So they
7 refused --

8 THE COURT: Say again now. You can't -- you do have
9 the software that he's talking about. You know what he's
10 talking about.

11 MR. ROBERTSON: I know what he's talking about.

12 THE COURT: You do have the software; is that right?

13 MR. ROBERTSON: I'm not a hundred percent positive.
14 I think we have Concordance®.

15 THE COURT: So you do have it?

16 MR. ROBERTSON: Yes, sir.

17 THE COURT: But as I understand what you are saying,
18 you can't use it because you don't have the metadata; is that
19 right or not?

20 MR. ROBERTSON: That's correct. That's absolutely
21 correct. And you can't use it to marry documents simply by
22 having OCR, because that just means you can scan it and then
23 search on the document. It doesn't tell you that another
24 document that may or may not have been produced is associated
25 with that cover email.

1 THE COURT: Would it solve the problem if they gave
2 you the metadata?

3 MR. ROBERTSON: Not completely, Your Honor, because
4 the representation was made that we have all the documents that
5 are associated with the emails. We'd ask them, if that's the
6 case, to please tell us what emails they were associated.

7 If I might just hand up to Your Honor, this is an
8 email chain that's dated April 29, you'll see, from Mike Cohen,
9 who is an in-house -- excuse me, who is a Lawson employee, or
10 was a Lawson employee, and a Mr. Bruce McPheeters who was their
11 general counsel.

12 Now, you'll see that one of the documents they
13 mentioned, redesign notes doc. We are missing that attachment.
14 It's not in the production. Now, this email, cover email was
15 produced to us as part of -- subsequent to Your Honor's ruling
16 and subsequent to our pressing them to produce documents that
17 concerned RQC.

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 Now, you'll note, Your Honor, this is a little bit

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED]
2 Now, I could search for months with this software
3 looking for metadata, but I'm not if I don't have the document
4 that was attached to the email in order to try to marry them
5 up.

6 Quite frankly, Your Honor, since the rule requires
7 that they be produced in the ordinary course of the business,
8 why should it be our burden to have to go through and go
9 through that exercise to match it up? They should know
10 readily, because they have the documents with the metadata,
11 and, apparently, they know quite well how to use this software
12 to do it.

13 It was their burden to do it, it's required under the
14 federal rules, it's required under case law, and I can't search
15 for documents I don't have.

16 If they now -- for the first time I'm hearing,
17 they're saying that we have all the documents with respect to
18 Exhibit 2. I don't know why they just didn't tell us that and
19 say, here's the emails they go with, because we had to go
20 through the exercise for that. It's just not right, Your
21 Honor.

22 MR. MARK: One technical clarification, Your Honor.
23 With each document production, what is provided are the
24 documents in an electronic format in OCR, and each one is also
25 accompanied by something called a load file. This file has in

1 it data that these computer programs read associated with Bates
2 numbers or other sequential numbers on the documents and
3 indicating familial relationships among the documents.

4 THE COURT: So it wouldn't take you any time to run
5 your program and get that together; right?

6 MR. MARK: Correct, and that is what we give them.

7 THE COURT: Why don't you do it?

8 MR. MARK: We have done that.

9 THE COURT: Why don't you do it and just run it and
10 give them the documents. What are you talking about in the way
11 of money?

12 MR. MARK: We've already done that. That is, in
13 fact, what we provide them.

14 THE COURT: You've given them the document and that
15 which is attached to it in the right order; is that what you
16 are saying?

17 MR. MARK: That's what I'm saying.

18 THE COURT: One of you has to be wrong here at
19 least -- you may be talking language that I don't understand,
20 but somebody is wrong.

21 MR. MARK: That's why, Your Honor, I guess we will
22 have the conversation and see what the issue is because --

23 THE COURT: Why don't you give it to them? Give them
24 to them in the order that they are kept in the regular course
25 of business, and you just give it to them that way.

1 If that means that you have to run another set of
2 them and hand them physically to them, do it. I don't know
3 what's the best way to do it, but I don't want to spend any
4 time on things like this, and I don't think you all ought to be
5 spending time on it, and if it's a question that you feel like
6 the expense is something you are twice incurring, keep a record
7 of it and then make a claim for the expense later.

8 I don't know how to resolve it when one of you says
9 it's so and another one says it ain't, as the old boy said,
10 without getting into it myself. And it seems to me like you're
11 willing to do it, and you're prepared to do it. You think
12 you've done it, but maybe you haven't done it the way that they
13 need it, and I think the way to do it is just go do it again.

14 MR. MARK: I think we will have the conversation with
15 them to see if it really is a problem that's identified, and we
16 will resolve it.

17 THE COURT: I don't want you to spend any more than
18 about 15 minutes solving the problem, and if they can't -- if
19 they don't feel like they've got it, you give it to them. If
20 it's a matter of expense, log the expense you incur and make a
21 claim for it later depending on who is right and who is wrong.

22 MR. MARK: Understood, Your Honor.

23 THE COURT: That ought to solve the problem.

24 MR. ROBERTSON: I just want to address one issue with
25 respect to that, Your Honor, and that is, there are some

1 underlying documents that we don't have the attachments for.
2 So they're going to have to go and figure out if we have all
3 the attachments, because they can't just provide an email and
4 have an underlying document that clearly was subject to Your
5 Honor's order on the subject matter waiver of RQC development
6 three weeks before Your Honor issues the injunction and just
7 say, we're not going to produce it, and there are several
8 instances of that.

9 THE COURT: Is that the one that's talked about in
10 this example you gave me called redesign notes?

11 MR. ROBERTSON: Yes, sir.

12 THE COURT: Did you give them that?

13 MR. MARK: This document --

14 THE COURT: Did you give them the redesign notes
15 which is an attachment to this document?

16 MR. MARK: Standing here right now, I cannot answer
17 that.

18 THE COURT: But you have to give it to them.

19 MR. MARK: Correct. I understand that. All I'm
20 saying is this was not on the list of the 15 documents attached
21 to Exhibit 2 of the reply brief, so I haven't -- I haven't
22 looked this up, so I can't answer that question.

23 THE COURT: What you have to do is you have to go
24 back through, and every document that has an attachment to
25 another document, you have to give them the cover -- what you

1 call the root document and the attachment together so that they
2 can see what it is, and if you say you've already done that and
3 you've done it once and they can't figure it out, if a simple
4 conversation won't show that, then do it again, give it to
5 them, and don't withhold anything that is clearly covered by
6 the order such as redesign notes that are attachments. Put
7 them together. Then give them -- then solve the software
8 problem, the matching-up problem the way I have indicated. It
9 seems to me like that ought to solve your problem.

10 MR. MARK: It should.

11 THE COURT: Okay, thank you. That ought to solve the
12 problem, Mr. Robertson. Makes it easier for me to deal with
13 the rest of them.

14 MR. ROBERTSON: Sure, assuming good faith --

15 THE COURT: They're going to do it right. Look,
16 let's assume -- let's do this. Let's accept that lawyers in
17 good faith can differ over things and that you have
18 responsible, good lawyers on both sides of this case, and
19 conversation between the two of you, apart from anything,
20 blames the other one for doing something tricky or wrong will
21 get things solved, just like this conversation did right here,
22 and you all didn't even need to deal with that.

23 You could have been back home last night if you all
24 had talked, both of you. And I'm not saying it's your fault
25 that you didn't talk, but I'm saying the failure to talk right

1 there is an example of how you had to incur some charges that
2 you didn't need to incur.

3 MR. THOMASCH: I wonder if in that 15-minute
4 conversation we can have -- if our IT person can talk to their
5 IT person. We might be able to just clear this up in a
6 heartbeat, because we do believe they have the capacity and
7 Concordance® to do this and match it up --

8 THE COURT: Beyond capacity, though, this is going
9 back and producing things you haven't produced.

10 MR. THOMASCH: We will check --

11 THE COURT: The lawyers and the IT people can talk.
12 You need to solve the problem and get this stuff delivered.

13 MR. THOMASCH: Absolutely.

14 THE COURT: That way we can get on with the case.
15 Speaking of which, when can we get on with the case? I want
16 you to give me the 23 documents in a separate package from the
17 226 documents, and I'm going to take a look at those.

18 MR. ROBERTSON: So we're clear, there is 226 under
19 one category and 23 under another.

20 THE COURT: Right. That's what I mean. I want
21 separate packages so I know that I'm dealing with a separate
22 package, and I want to see them, and I'm going to look at them.

23 MR. THOMASCH: Both packages. You want both packages
24 separated?

25 THE COURT: Yes, so I can know what I'm dealing with.

1 I don't want to have to go through and un-shuffle.

2 MR. THOMASCH: It should be very clear.

3 THE COURT: I'll look at those. I think I know how
4 to solve the problem with the rollout information and the
5 litigation matter which you are concerned about, defense of the
6 case issue that you raised. I think I can solve that. And I
7 think now we've solved the attachment problem by virtue of what
8 we've just been through, so that leaves me to solve the
9 earlier, the first thing you had -- first issue you had
10 argument about which is generally how to deal with the larger
11 problem of the RQC waiver, and I'm going to look at that in
12 view of what you've said.

13 You need to be aware that in *In Re: Grand Jury*
14 *Proceedings*, 748 F.2d 871 at 875, our Court of Appeals has held
15 that if a client communicates information to his attorney with
16 an understanding that the information will be revealed to
17 others, that information, as well as the details underlying the
18 data which was to be published, will not enjoy the privilege.
19 Footnote seven is the indicator there, and footnote seven
20 explains what the details are. So it's not privileged in the
21 first place.

22 Now, the privilege of which the Court writes there is
23 the attorney-client privilege. I do not know whether this has
24 been applied to the work product privilege by our Court of
25 Appeals, and I haven't had time to look at that. But -- and if

1 you'll look at note seven in the case, it says it recognizes
2 that there may be some privileged document components of an
3 otherwise non-privileged document such as this affidavit of
4 Mr. Dooner that's in draft form.

5 It may be that that document is not privileged from
6 the attorney-client privilege, but it may have a work product
7 privilege associated with it that is -- that's over to the side
8 in this notation here. Then you have the added problem that
9 once you've produced this document, you have to produce -- the
10 one that you did produce, you have to produce all of it, all of
11 them, every copy of it. And then you have to decide whether or
12 not the principle in 748 F.2d 871, footnote seven, and the text
13 adjoining and the whole opinion doesn't require you to produce
14 the whole thing if it's intended for public consumption when it
15 is prepared.

16 MR. ROBERTSON: Your Honor, could I address that
17 point for one issue, because you raised Mr. Dooner's
18 declaration. Of course, that declaration was submitted to this
19 Court in final form for purposes of trying to convince the
20 Court that RQC was different from RSS.

21 So it falls directly under your fourth holding in
22 your ruling that Lawson has not shown work product protection
23 attaches to lawyer work in developing RQC. So there are
24 several other declarations that they have not produced
25 throughout declarations that are part of the privilege log, and

1 we would think under the case that you just cited and your
2 ruling, that work product with regard to the RQC is not
3 protected, that they would have to produce all draft
4 declarations and any documents that fall within the scope of
5 that waiver.

6 MR. THOMASCH: Your Honor, I will, of course, read
7 that case and the footnote and the text very closely. I'm not
8 familiar with it. I do not believe that the Dooner draft
9 declaration was part of the motion that was briefed and on
10 which Your Honor made findings of waiver.

11 THE COURT: That's what I need to know, is what does
12 the Dooner affidavit relate to, this draft? When was it
13 prepared, the draft here? I don't see a date on it. It's on
14 one of the privilege logs. When was the date of this thing?

15 MR. THOMASCH: I believe it is September, but I'm
16 operating from memory, Your Honor.

17 THE COURT: Why was the final form of it submitted?
18 You said it was submitted for a purpose, and I didn't quite get
19 --

20 MR. ROBERTSON: It was submitted in opposition, Your
21 Honor, by Merchant & Gould --

22 THE COURT: Opposition to what?

23 MR. ROBERTSON: The show cause motion for why Lawson
24 should not be found in contempt. It was submitted because --

25

1 [REDACTED]
2 So there were several declarations submitted in
3 opposition to that show cause motion which we feel reveal that
4 there were no colorable differences between RQC and RSS when
5 you look at the communications associated between the lawyer
6 and the affiant in the documents.

7 THE COURT: How can you say that if you don't have
8 them already? If you already have them, why am I dealing with
9 them?

10 MR. ROBERTSON: I only have one, and there were
11 several other Dooner declarations on the list that they haven't
12 given us, and there's a Christopherson --

13 THE COURT: Seven other drafts of the Dooner --

14 MR. ROBERTSON: Yes, I believe they are drafts. And
15 there's a Christopherson one. I will just note that here they
16 are representing that the shopping cart had been removed as one
17 of the changes, and they still maintain the shopping cart is

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 I'm sorry, Your Honor, that's paragraph 11 in the
22 [REDACTED]
23 [REDACTED]

24 THE COURT: If I had my magnifying glass, I might be
25 able to read those, but I can't read them.

1 MR. ROBERTSON: Well, Your Honor, I'm just saying
2 that's why it's relevant.

3 MR. THOMASCH: Your Honor, I'm not addressing
4 relevance, simply the question -- it was sort of an attempt to
5 slide this in and say you've already decided on this and other
6 similar affidavits in litigation, and Your Honor's work product
7 ruling concerned documents that were during the pre-release
8 period, and you found that during that period where the people
9 were engaged in making recommendations about what should be
10 done to bring the product through the design process, you found
11 that we had not made a showing.

12 You made it clear at page 22 and 23 that that was --
13 that's a document-specific showing, and it hasn't been
14 litigated with regard to documents that weren't part of that
15 prior motion. I'm not trying to argue the merits of that other
16 than to say you haven't decided this issue already on this and
17 other declarations, and other declarations could well be
18 privileged under the attorney work product privilege and not --
19 and it doesn't matter about the scope of the subject matter
20 waiver for that purpose.

21 THE COURT: No, I see what you are saying. All
22 right, thank you.

23 MR. THOMASCH: Thank you.

24 THE COURT: Your argument, Mr. Robertson, smacks more
25 of fraud-crime exception argument respecting the Merchant Gould

1 work in filing these affidavits and the client than it does of
2 waiving the privilege in the development process. The mere
3 fact that this guy's job was to develop things, that statement
4 alone doesn't flip it into the process of that which has been
5 waived earlier in the development, because it was -- of the way
6 things were used in the development process, I don't think.

7 It may be -- the way you are making the argument, you
8 are really making a crime-fraud exception argument, not an
9 argument on the scope of the ruling as I hear you. And I don't
10 have that motion, and so I'm not going to decide that issue.

11 MR. ROBERTSON: Well, Your Honor --

12 THE COURT: I'm not inviting one, either.

13 MR. ROBERTSON: I understand.

14 THE COURT: I'm just saying that that seems to me
15 where you are pitching your argument, and it's not in the
16 briefs, it's not something they've even had an opportunity to
17 respond to, and so I'm not going to decide it on that
18 framework.

19 MR. ROBERTSON: I'm not asking to you decide it on
20 that grounds, Your Honor. I think, you know, once we have
21 production of many of these privileged documents we're looking
22 at and documents we've already seen which suggest that this RQC
23 was a fraud and was a fraud on the court because it was
24 proffered to the Court as if it were a significant change in
25 RSS, but a document like that can go to relevancy of whether

1 RQC and RSS are the same.

2 THE COURT: It can go to the relevance, but that
3 doesn't solve the problem whether the privilege has been
4 waived. They are two different questions. There's a lot of
5 stuff that's relevant as to -- if there were no privilege
6 that's related to it or protects it that would come in over a
7 relevance objection, but that's not what we have here.

8 MR. ROBERTSON: I'm just -- I'm saying it's relevant
9 to both issues, crime fraud and to whether there are colorable
10 differences between RQC and RSS.

11 THE COURT: It may be relevant to a colorable
12 difference argument, but before you ever get to that issue, the
13 point is, is it protected by the privilege or not and the scope
14 of the ruling that was made, and Mr. Thomasch is saying that by
15 virtue of the timing of it, it is beyond the period when the
16 ruling applies. Isn't that what your argument is?

17 MR. THOMASCH: Correct, Your Honor.

18 MR. ROBERTSON: I'll have to go back and look at the
19 precise language, Your Honor. I do have it here, but I don't
20 have it right in front of me. I understood the work product
21 protection attaches to lawyer work in developing RQC, and I
22 understood that to be a subject matter waiver as well because
23 you were saying Lawson has not shown work product protection
24 with respect to developing RQC.

25 THE COURT: I know, and he's saying this isn't

1 development. This is defending your motion.

2 MR. ROBERTSON: Well, substantively, what
3 Mr. Dooner --

4 THE COURT: And that may be -- and it may be that
5 what's being said here is wrong and shouldn't be provided,
6 but -- I mean and shouldn't be allowed over -- to be protected
7 by the attorney-client privilege because it's subject to the
8 crime-fraud exception, but I don't have that in front of me
9 yet, and I'm not ruling on that.

10 MR. ROBERTSON: I understand, sir, but according to
11 the case that you just gave us, if that was intended and was
12 made public, then, as you indicated, that and all subsequent or
13 all previous drafts should be produced.

14 THE COURT: I agree. That's what it says. Over a
15 claim of attorney-client privilege. That's what that case
16 held. I thought I made that clear that that's what the case
17 was and that I personally hadn't had the time to go back and do
18 the checking to ascertain -- I have a recollection that this
19 principle applies with equal force in the work product area,
20 but there is also a nagging feeling that maybe that
21 recollection isn't right, and I haven't had time to look at it.

22 MR. ROBERTSON: I'm sure we'll both go back and look
23 at that. Thank you.

24 THE COURT: I'm sure you will. Anything else?

25 MR. THOMASCH: No, Your Honor, except to point out

1 that on the 14th of September, you specifically cautioned
2 against embedded arguments about crime fraud that weren't the
3 subject of a motion that put us fairly on notice and allowed us
4 --

5 THE COURT: I thought I just repeated that.

6 MR. THOMASCH: Yes, sir.

7 THE COURT: I'm not deciding it on the basis of the
8 crime fraud issue. That is an entirely different question with
9 a lot of different tests, and it may require different proofs.
10 I don't know, and if he thinks, Mr. Robertson thinks that there
11 is a basis for bringing such a motion, he can bring that
12 motion, and I'll have to deal with it. Until then, I'm going
13 to say grace over what I've got, because that's enough for now.

14 MR. THOMASCH: I understand, and I think we're
15 actually done discussing the documents noting that we do have
16 someone who is coming to the court. If the contents of the
17 documents is going to be discussed, I'd want to raise that
18 issue again, but I don't think it's necessary now, because I
19 think we're probably done that discussion.

20 THE COURT: Okay, anything else that needs to be done
21 on this matter? I need to set a date for a hearing here and
22 get moving.

23 MR. ROBERTSON: Yes, Your Honor.

24 THE COURT: Excuse me just a minute. Ma'am, are you
25 with one of the parties here?

1 UNIDENTIFIED SPEAKER: No, sir.

2 THE COURT: Who are you with?

3 UNIDENTIFIED SPEAKER: I'm with a class.

4 THE COURT: Oh, you're a student?

5 UNIDENTIFIED SPEAKER: Yes.

6 MR. ROBERTSON: I'm not going to discuss substance --

7 THE COURT: We're through with the sealed part of the
8 transcript, and the young lady may remain. Sorry, we had
9 closed the proceedings, and we needed to ascertain that. All
10 right.

11 MR. ROBERTSON: Yes, Your Honor, we would like to set
12 a date. Obviously we're anticipating production of some of the
13 documents subject to Your Honor's order. We'd like to review
14 them. It may require supplementing expert reports, but we
15 think since the documents have been in their possession for the
16 entire time and knew what they are, we should be permitted to
17 supplement our expert reports expeditiously --

18 THE COURT: Slow down.

19 MR. ROBERTSON: -- and get on with the hearing.

20 THE COURT: I assume you haven't been somnolent
21 during the period of time that you've been litigating this
22 issue, that you all have been evaluating what you have been
23 provided, haven't you, or have you just been putting it off on
24 the side waiting for it to become more useful?

25 MR. ROBERTSON: We have reviewed them and separated

1 them into what we call a hot documents folder, sir.

2 THE COURT: Are you ready to use them?

3 MR. ROBERTSON: We would like this additional
4 production.

5 THE COURT: Do you need any more discovery?

6 MR. ROBERTSON: No, Your Honor. I'm sorry, yes. I'm
7 reminded, since it's been sometime, we need additional
8 financial information from Lawson with respect to the sale of
9 RQC during this period since last year, Your Honor.

10 THE COURT: Okay. Is there an outstanding document
11 request that asks that, and if so, then they have an obligation
12 to update their response.

13 MR. ROBERTSON: There was an original document
14 request, and they produced some documents, but they haven't
15 produced anything since last year.

16 THE COURT: I'm sure you can talk to Mr. Thomasch.

17 MR. THOMASCH: Yes, we're actively working on a
18 production, an update through the last fiscal quarter which is
19 August 31, and we're working on that right now. We should have
20 that, and we'll produce it as soon as we have it, but we're
21 going forward already on that.

22 THE COURT: All right. I'm not -- excuse me.

23 MR. THOMASCH: There was just a sort of a suggestion
24 by Mr. Robertson that the plaintiffs would update their expert
25 reports. Obviously, if export reports --

1 THE COURT: And you can't was the implied suggestion.

2 MR. THOMASCH: It was, and I was just sort of --

3 THE COURT: You rose to take issue.

4 MR. THOMASCH: I was going to put our bid in for
5 possible mutuality of disclosure and opportunity to defend the
6 case. Thank you, Your Honor.

7 THE COURT: I can't imagine you'd want to do
8 something like that. All right. Well, I can't set the interim
9 schedule, but I'm going to decide this document issue as soon
10 as I can, and I'd like to go on and get on your dance card now
11 for the future.

12 Since they don't anticipate any discovery, you do
13 have probably -- I mean depositions, they are going to want to
14 do an updated expert report, I can sense, and so are you, and I
15 suppose you'll both -- do you want to depose each other's
16 experts?

17 MR. ROBERTSON: We've already deposed them, Your
18 Honor.

19 THE COURT: In view of the updated reports, I guess
20 is the question.

21 MR. ROBERTSON: I suppose if they want to depose our
22 expert, we expect mutuality as well, Your Honor, but right now
23 I don't see the need to redepose the expert. I'll put him on
24 the witness stand and go from there.

25 THE COURT: He may have another report after your

1 report.

2 MR. THOMASCH: Your Honor, I would not like to commit
3 as to whether or not a deposition of their expert is
4 appropriate until we see the revised expert report. It might
5 be that he adds in two documents. It might be he changes his
6 whole approach, and I think that would affect our thinking.

7 I would respectfully suggest to the Court that, in
8 Lawson's view, when we left on the 29th of February, you
9 specifically directed us to brief the process by which we would
10 have a hearing, how do we define the animal against which the
11 more than colorable changes are measured, in Your Honor's
12 words, and there has been a significant exchange of letters
13 with the Court on that subject.

14 THE COURT: I need to pull those back out and look at
15 them.

16 MR. THOMASCH: We would very much request an
17 opportunity for a hearing on that, because I think that coming
18 out of that it will be very clear as to how long the proceeding
19 will take which, I think, is going to be shorter than it would
20 otherwise be, when it should take place, and what the experts
21 will say which, I think, is going to be much less than the
22 experts have said so far.

23 I think if we just know what Your Honor views,
24 because this is Your Honor's decision as to what you find was
25 asserted and proved at the first case, and if you tell us that,

1 I think we'll have a roadmap to a hearing that can happen
2 quickly and easily.

3 THE COURT: And they say I don't have to do that.

4 MR. THOMASCH: They say you don't have to, and we
5 would like a hearing on that issue.

6 THE COURT: I have to read all those. Does somebody
7 have -- you all did this in letters, did you not?

8 MR. THOMASCH: Yes, Your Honor, there are letters.
9 You asked us to confer.

10 THE COURT: Are they only in letters?

11 MR. THOMASCH: Yes. There are no briefs on this.
12 There are six letters, three from each side. We can give you
13 those in bound form today.

14 THE COURT: I would like to have them that way. That
15 would be great. I think I've got everything assembled
16 properly, but if you have them --

17 MR. THOMASCH: I want to make a copy that isn't
18 highlighted so there's no questions.

19 THE COURT: Let me read those, and I'll be back in
20 touch with you. Anything else that needs to be done today?
21 All right.

22 MR. ROBERTSON: No, Your Honor.

23 MR. THOMASCH: No, Your Honor.

24 THE COURT: We'll be in adjournment.
25

(End of proceedings.)

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s/

P. E. Peterson, RPR

Date _____